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Bankruptcy: Dealing with Financial Failure for Individuals and Businesses

David G. Epstein  
*University of Richmond, depstein@richmond.edu*

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PREFACE TO THE FOURTH EDITION

We have each enjoyed different experiences over the course of our professional careers, but we share a common approach to learning about bankruptcy law. We believe that the federal bankruptcy system rests on a handful of basic building blocks and that, if you understand these building blocks and the relationship among them, you will be equipped to cope with the legal issues that arise in all kinds of bankruptcy cases, ranging from an individual person's Chapter 7 liquidation case to a Fortune 500 Chapter 11 reorganization.

It is for this reason that, in a sense, this book starts in the middle of the story. The story starts with a happy beginning, turns sad, and then ends up not quite with everyone living happily ever after, but everyone ends up generally ok. In the beginning C thought well enough of D to extend credit of one sort or another to D, with a mutual agreement regarding repayment terms. The sad part occurs when D can no longer meet those payment terms. C and D are in conflict. In the “real world,” these problems are often resolved without litigation or other formal recourse to the legal process, and without lawyers. For example, D and C work out some sort of alternative payment plan and D is eventually able to pay C in accordance with the terms of that alternate plan. Sometimes, however, the parties cannot solve their own problems. This is when they turn to their lawyers to look for solutions. That’s what this book is about; what lawyers can do to fix these kinds of problems.

But lawyers can be helpful in resolving debtor-creditor problems, with or without recourse to bankruptcy and other legal process, but only if they know the legal rights and remedies of debtors and creditors. And, except for the “lawyers” on The Good Wife (or whatever “lawyers show” is currently popular), or a John Grisham novel, most lawyers spend most of their time in the office working on their clients’ problems. So, you will spend most of your time in this book working on your clients’ problems. All of the problems in the book can be understood and discussed either from materials already considered in the book or from the citation that appears sometimes at the end of a problem. We have made a special effort to design problems that could be discussed on the basis of the materials surrounding them.

Bankruptcy impacts so many aspects of what lawyers do, from business transactions to consumer protection to litigation of domestic relations matters. Understanding bankruptcy is thus critically important for almost every lawyer. To meet this challenge, we want you to learn the basics of debtor creditor law, to become familiar with the issues of debtor-creditor law that you are likely to encounter in practice, and to think about the policy questions that underlie those issues. While policy
questions are consistently and constantly raised, the book does not (unlike some others) espouse any particular theory or philosophy of debtor-creditor law. You are left to develop your own opinions on these policy issues. The only “message” that we are trying to convey is that this stuff is important, interesting and intellectually challenging.

Another point that distinguishes this book from others is its organizational style. Instead of tackling the diverse subject of bankruptcy by sequentially marching through the federal Bankruptcy Code, or first initially considering only consumer bankruptcy issues and then turning to commercial/business cases, we take a different tack. After laying out the basic building blocks we spoke of a moment earlier, we consider the legal issues bearing on all bankruptcy cases involving individual debtors—both consumer and business. Then we turn our focus issues arising in all business cases—both individual (sole proprietorship) and entity (e.g., corporate).

We do think bankruptcy law is fun. Fun because it can be intellectually challenging; fun because it can be helpful in solving problems that really matter to the people involved. We had fun working together on this book. We hope you’ll have fun working through it. We also wish you great success in your legal career.

One short note from Markell. Many people helped him along the way (because, God knows, he needed it). Early on, it was the partners at Sidley & Austin who made him a bankruptcy lawyer. Tips of the hat to Robert Shutan, J. Ronald Trost, Richard Broude, Richard T. Peters, Richard Havel, Sally Neely, and Marc Levinson. They took a big risk when they didn’t have to; and Markell is (and should be) eternally grateful. More recently, it was the bright and energetic students at Northwestern who helped him avoid many errors in the book when he taught there in Fall of 2014. The biggest thanks go to Joshua Altman, William Carpenter, Jeffrey L. Kinney, Ryan Miller, Colby Rogers, and Jeff Wysong, although the entire class was a joy to teach. Finally, kudos to his wife, Emily Kadens, who puts up with him and the meshugaas he creates. Patiently.

A few notes before we turn you over to the text. In this edition, we say farewell to Judge Elizabeth Perris, who helped keep us honest and steered us straight on the first three editions. She is retiring from the bench and so retires from this book (but, let it be said, is not the retiring type). Trying to fill her shoes (although he is not a cross-dresser—we think) is Professor Larry Ponoroff, from the University of Arizona. Two of us (Epstein and Markell) have tried to persuade Larry to join the book all along (and work with him on another book), and we finally succeeded when Larry saw that the book would go to hell as soon as Judge Perris left.
At any rate, we say good-bye to Judge Perris, and hello to Larry. Now on to the text.

DGE
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