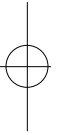
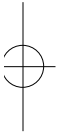


Bankruptcy



*Carolina Academic Press
Law Casebook Series
Advisory Board*



Gary J. Simson, Chairman
Cornell Law School

Raj K. Bhala
The George Washington University Law School

John C. Coffee, Jr.
Columbia University School of Law

Randall Coyne
University of Oklahoma Law Center

John S. Dzienkowski
University of Texas School of Law

Paul Finkelman
University of Tulsa College of Law

Robert M. Jarvis
*Shepard Broad Law Center
Nova Southeastern University*

Vincent R. Johnson
St. Mary's University School of Law

Thomas G. Krattenmaker
*Director of Research
Federal Communications Commission*

Michael A. Olivas
University of Houston Law Center

Michael P. Scharf
New England School of Law

Peter M. Shane
Dean, University of Pittsburgh School of Law

Emily L. Sherwin
University of San Diego School of Law

John F. Sutton, Jr.
University of Texas School of Law

David B. Wexler
University of Arizona College of Law

Bankruptcy

Problems, Cases, and Materials

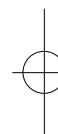
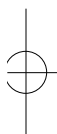
Walter W. Miller, Jr.

PROFESSOR OF LAW,
BOSTON UNIVERSITY SCHOOL OF LAW

Carolina Academic Press
Durham, North Carolina

Copyright © 2003 Walter W. Miller, Jr.
All Rights Reserved

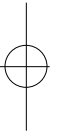
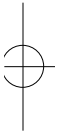
ISBN 0-89089-111-7
LCCN 2002115106

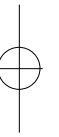


Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap-press.com
www.cap-press.com

Printed in the United States of America.

For Anne





Contents

| | |
|---|-----------|
| Table of Cases | xiii |
| Table of Statutes | xv |
| Foreword | xix |
| Preface | xxiii |
| Introduction | 3 |
| A. The Equitable Foundation | 3 |
| <i>Bank of Marin v. England</i> | 5 |
| B. Purpose/Structure of the Bankruptcy Code | 7 |
| 1. Remedial Chapters | 7 |
| 2. Chapters of General Applicability | 10 |
| C. Future Directions | 11 |
| Part I A Remedy for Business: Chapter 11 of the Bankruptcy Code | 13 |
| Problem 1 Fancy Retail Clothing and F.com | 14 |
| A. Introduction | 14 |
| B. Problem 1: Fancy Retail Clothing and F.com | 15 |
| C. Questions, Cases, and Text | 19 |
| 1. Evaluating the Problem | 19 |
| <i>Hager v. Gibson</i> | 20 |
| <i>In re Tarletz</i> | 22 |
| The U.S. Trustee System | 26 |
| Automatic Stay under § 362 | 28 |
| 2. Disposing of Property (§ 363) & Assuming and Rejecting Executory Contracts, Unexpired Leases and Licenses (§ 365) | 28 |
| a. Disposing of Property, Selling Assets (§ 363) | 29 |
| The <i>Toysmart.com</i> Case | 29 |
| b. Assuming and Rejecting Executory Contracts, Unexpired Leases and Licenses (§ 365) | 31 |
| c. Disposition of Leases under § 365 | 33 |
| d. Interaction of Leases under § 365 and Other Provisions | 35 |
| e. Licenses of Intellectual Property under § 365 | 36 |
| 3. Collective Bargaining Agreements (§ 1113) | 36 |
| a. The <i>Bildisco</i> Case | 36 |
| <i>NLRB v. Bildisco & Bildisco</i> | 37 |
| The <i>Bildisco</i> Dissent | 40 |
| b. Analysis of § 1113 Requirements | 41 |
| i. Necessity of the Modifications | 41 |

| | |
|---|-----|
| ii. Fairness as to All Parties | 43 |
| iii. Good Cause | 43 |
| iv. Balancing the Equities | 44 |
| Problem 2 CJX Plastics | 46 |
| A. Introduction | 46 |
| B. Problem 2: CJX Plastics | 49 |
| C. Questions, Cases, and Text | 50 |
| 1. Terms | 50 |
| a. Corporations | 50 |
| b. Bifurcate | 51 |
| c. Estimation | 52 |
| d. Valuation | 52 |
| e. Present Value | 53 |
| f. Creditor with a Secured Claim | 54 |
| g. Shareholder | 54 |
| h. Risk and Return | 54 |
| 2. The Concept of A Claim: When Does a Claim Exist? | 56 |
| Note— <i>Manville I</i> | 57 |
| <i>In re Johns-Manville Corp. [Manville II]</i> | 60 |
| The UNR Approach | 66 |
| <i>Manville Revisited</i> | 69 |
| The <i>Manville</i> Trust | 69 |
| <i>A.H. Robins</i> and the Dalkon Shield | 70 |
| Congress Springs To Action—Section 111(a) of the Bankruptcy Reform Act of 1994 | 70 |
| Section 111(b) of the Bankruptcy Reform Act of 1994 | 71 |
| The Class Action as an End Run | 72 |
| Note—Jury Trials for Personal Injury/Wrongful Death | 75 |
| <i>In re Piper Aircraft Corp.</i> | 76 |
| Note—Piper | 79 |
| <i>Jones v. Chemetron Corp.</i> | 81 |
| Note—Successor Liability | 83 |
| Distinguishing Successor Liability from Discharge | 86 |
| 3. Estimation, Valuation and Discharge | 88 |
| a. Estimation of a Claim's Worth under §502(c) | 91 |
| <i>Bittner v. Borne Chemical Co.</i> | 91 |
| b. Valuation of the Collateral Securing a Claim under § 506(a) | 97 |
| <i>Ford Motor Credit Co. v. Dobbins</i> | 98 |
| Note—Determining Value | 104 |
| <i>Associates Commercial Corp. v. Rash</i> | 105 |
| The <i>BFP</i> Case | 112 |
| The <i>Dewsnup</i> Case | 113 |
| The <i>Nobelman</i> Case | 114 |
| The Impact of § 1111(b) on Valuation | 115 |
| c. Claim and Discharge | 117 |
| <i>Ohio v. Kovacs</i> | 118 |
| <i>In re Kilpatrick</i> | 122 |

| | |
|---|-----|
| 4. Automatic Stay | 124 |
| <i>EEOC v. Rath Packing Co.</i> | 125 |
| 5. Abandonment | 128 |
| <i>Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Prot.</i> | 128 |
| <i>In re Smith-Douglass, Inc.</i> | 130 |
| Problem 3 RDT Research & Development | 133 |
| A. Introduction | 133 |
| B. Problem 3: RDT Research & Development | 133 |
| C. Questions, Cases, and Text: Developing a Plan for RDT | 134 |
| 1. Evaluating the Problem: Is Chapter 11 A Realistic Possibility? | 134 |
| 2. Formulating a Reorganization Plan | 135 |
| 3. A Sample Plan | 137 |
| a. Letter of the Attorney for the Official Creditors' Committee which was created pursuant to § 1103(c)(3) | 138 |
| b. Ballot sent to Creditors with Letter of Creditors' Committee | 139 |
| c. Court Order approving Disclosure Statement | 140 |
| d. Disclosure (in this case Amended) Statement | 141 |
| e. The Debtor's Plan of Reorganization, included with the Disclosure Statement | 144 |
| 4. Takeover Threats | 152 |
| a. The Dangers of Creditor Takeover and Its Source | 154 |
| Background | 154 |
| The Standard Today | 156 |
| Creditor Takeover | 158 |
| Defending Against Takeover | 159 |
| b. The New Value Exception — Keeping Ownership Even When All Classes of Claims Do Not Accept Your Plan | 161 |
| <i>In re U.S. Truck Co.</i> | 161 |
| <i>In re Mastercraft Record Plating, Inc.</i> | 177 |
| 5. Evaluating a Chapter 11 Reorganization | 178 |
| a. Valuation, Disclosure, and Cramdown | 178 |
| b. The Supreme Court Speaks | 179 |
| <i>Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship</i> | 179 |
| Problem 4 Yellow Air, Inc. Asset Sale | 192 |
| A. Introduction | 192 |
| B. Problem 4: Yellow Air, Inc. Asset Sale | 193 |
| C. Questions | 197 |
| Ethical and Practical Considerations | 199 |
| Evolution of § 363(b): A review of case law | 199 |
| <i>In re Continental Air Lines, Inc.</i> | 199 |
| <i>In re Abbotts Dairies</i> | 204 |
| Problem 5 Guarding Against Abuse | 213 |
| A. Introduction | 213 |
| 1. The Enron Bankruptcy Proceeding | 215 |
| 2. Procedural Safeguards; Successor Liability; Appointment of a Trustee; Preference; SEC Involvement | 217 |
| 3. Substantive Safeguard?: The Absolute Priority Rule and the Fair and Equitable Standard | 219 |

| | |
|--|-----|
| 4. The Bankruptcy Administration | 220 |
| B. Problem 5: Guarding Against Abuse | 221 |
| C. Questions, Cases, and Text | 223 |
| Part II Remedies for the Individual | 229 |
| Introduction to Problems 6 and 7 | 229 |
| Problem 6, Part 1 Henry and Alice Jones & Chapter 13 | 234 |
| A. Introduction | 234 |
| B. Problem 6, Part 1: Henry and Alice Jones & Chapter 13 | 235 |
| C. Questions, Cases, and Text | 236 |
| Good Faith & Chapter 13 | 238 |
| <i>In re Britt</i> | 238 |
| Introduction to <i>Greer, Kitson, Keckler and Rogers</i> | 241 |
| <i>In re Greer</i> | 243 |
| <i>In re Greer Schedules</i> | 245 |
| <i>In re Kitson</i> | 246 |
| <i>In re Kitson Schedules</i> | 249 |
| <i>In re Keckler</i> | 252 |
| <i>In re Rogers</i> | 254 |
| <i>In re Taddeo</i> | 257 |
| Problem 6, Part 2 Henry and Alice Jones & Chapter 7 | 260 |
| A. Introduction | 260 |
| B. Problem 6, Part 2: Henry and Alice Jones & Chapter 7 | 260 |
| C. Questions, Cases, and Text | 260 |
| 1. Saving the House | 260 |
| <i>Summy v. Schlossberg</i> | 261 |
| <i>United States v. Whiting Pools, Inc.</i> | 263 |
| Note — Reaffirmation | 271 |
| 2. Saving the Car | 272 |
| <i>In re Bell</i> | 275 |
| 3. Saving Other Personal Property | 276 |
| Problem 7 Jayne Belmont, the Middle Management Executive & Chapter 7 | 278 |
| A. Introduction | 278 |
| B. Problem 7: Jayne Belmont, the Middle Management Executive | 281 |
| C. Questions, Cases, and Text | 282 |
| 1. Filing the Petition | 282 |
| <i>Toibb v. Radloff</i> | 282 |
| <i>In re Noonan</i> | 287 |
| 2. The Estate | 288 |
| <i>Patterson v. Shumate</i> | 289 |
| 3. Exemptions | 292 |
| <i>In re Smith</i> | 292 |
| 4. Redemption and Reaffirmation Redux: §§ 722 and 523(c) & (d) | 299 |
| 5. The So-Called “Chapter 20” | 300 |
| <i>Johnson v. Home State Bank</i> | 300 |

| | |
|--|-----|
| 6. Discharge | 303 |
| 7. Conversion and Dismissal | 306 |
| Part III Building Up the Estate | 307 |
| Problem 8 ABC Corporation | 308 |
| A. Introduction | 308 |
| B. Problem 8: ABC Corporation | 311 |
| C. Questions, Cases, and Text | 312 |
| 1. Preference | 314 |
| a. The Ordinary Preference— Payment to an Unsecured Creditor | 314 |
| <i>Barnhill v. Johnson</i> | 315 |
| b. The More Complex Preference— Dealing with Secured Creditors | 322 |
| Payments Made to Secured Creditors | 322 |
| <i>In re Powerine Oil Co.</i> | 323 |
| <i>In re El Paso Refinery, L.P.</i> | 326 |
| Using Preference to Avoid the Security Interests of Secured Creditors | 327 |
| <i>Fidelity Financial Services, Inc. v. Fink</i> | 329 |
| <i>In re Abruzzese</i> | 335 |
| 2. Trustee's Rights as Hypothetical Lien Creditor or Bona Fide Purchaser & Trustee as Inheritor of Rights of Certain Real Creditors Holding Unsecured Claims | 338 |
| a. The Trustee as Hypothetical Lien Creditor or BFP under § 544(a) | 338 |
| b. Section 544(a)(1) and (2)—The <i>Downey</i> Case | 340 |
| <i>In re Downey</i> | 341 |
| c. Section 544(a)(3)—The <i>Rodriguez</i> Case | 345 |
| <i>In re Rodriguez</i> | 346 |
| d. The Trustee as Inheritor of Certain Rights of Real Creditors Holding Unsecured Claims under § 544(b) | 349 |
| <i>In re Acequia, Inc.</i> | 349 |
| 3. Statutory Liens | 360 |
| 4. Fraudulent Conveyance under § 548—The <i>Roco</i> Case | 361 |
| <i>In re Roco Corp.</i> | 363 |
| Part IV Municipal Bankruptcies, Farm Reorganizations, Procedure | 371 |
| Problem 9 Chapter 9—Lemon County | 372 |
| A. Introduction | 372 |
| B. Problem 9: Lemon County | 373 |
| C. Questions, Cases, and Text | 377 |
| <i>In re Orange County</i> | 377 |
| <i>In re County of Orange</i> | 384 |
| Problem 10 Chapter 12—George and Sarah Johnson & the Family Farm | 396 |
| A. Introduction | 396 |
| B. Problem 10: George and Sarah Johnson & the Family Farm | 396 |

| | |
|---|-----|
| C. Questions, Cases, and Text | 397 |
| <i>Norwest Bank Worthington v. Ahlers</i> | 400 |
| 1. Determining Eligibility | 410 |
| 2. Formulating a Plan | 411 |
| 3. Comparing Chapter 12 to Chapters 11 and 13 | 413 |
| Problem 11 Procedure | 414 |
| A. Introduction | 414 |
| B. Problem 11: Procedure | 416 |
| C. Questions, Cases, and Text | 417 |
| Index | 429 |

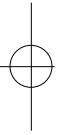


Table of Cases

(primary cases in **bold**)

- In re Abbotts Dairies** 204
In re Abruzzese 335
In re Acequia, Inc. 349
In re A.H. Robins 6, 70
Amchem Prods. v. Windsor 75
In re American Preferred Prescription, Inc. 227
In re Andrews 304
In re Apex Express Corp. 421
In re Ashe 94
Ashton v. Cameron Co. Water Improvement Dist. 3
Associates Commercial Corp. v. Rash 105
Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Pshp. 179
Bank of Marin v. England 5
Bank One, N.A. v. Flowers 115
Barnhill v. Johnson 315
In re Bell 275
In re Ben Cooper, Inc. 424
BFP v. Resolution Trust Corp. 112
In re Bibo, Inc. 227
Bittner v. Borne Chemical Co. 91
In re Britt 238
In re C.F. Smith & Assoc., Inc. 96
Case v. Los Angeles Lumber Products Co. 166, 177, 182–183, 190, 400–402
Celotex Corp. v. Edwards 7, 415, 421
In re Celotex Corp. 6
In re Chicago Milwaukee, St. Paul and Pacific R.R. Co. 7
Chicago Truckdrivers v. Tasemkin, Inc. 198
In re Continental Air Lines, Inc. 199
In re County of Orange 384
County of Orange v. Merrill Lynch 394
Dewsnup v. Timm 113
Doan v. Hudgins 294
In re Dow Corning Corp. 71
In re Downey 341
In re Dunckle Assoc. 6
EEOC v. Rath Packing Co. 125
In re El Paso Refinery, L.P. 326
Farrey v. Sanderfoot 296
Fidelity Financial Services, Inc. v. Fink 329
Ford Motor Credit Co. v. Dobbins 98
FTC v. Toysmart.com 29
Granfinanciera v. Nordberg 422
In re Green 293
In re Greer 243
Grogan v. Garner, 303, 304
Hager v. Gibson 20
H.K. Porter Co. v. NLRB 45
In re Hunter 303
In re Intercat, Inc. 226
International Shoe v. Pinkus 74
In re Ionosphere Clubs Inc. 226
In re Johns-Manville Corp. (Manville I) 57
In re Johns-Manville Corp. (Manville II) 60
In re Johns-Manville Corp. (Manville III) 69
Johnson v. Home State Bank 300
Jones v. Chemetron 81
Katchen v. Landy 75
In re Keckler 252
In re Kelly 242
In re Kestell 230, 306
In re Kilpatrick 122
In re Kitson 246
In re Kujawa 27
In re Langenkamp v. Culp 425
Levin v. Mauro 273
In re Lionel Corp. 226
In re Long 305, 405
In re Lowenschuss 71
In re Main Line Motors, Inc. 227
In re Marvel Entertainment Group 227
In re Mastercraft Record Plating, Inc. 177
Mellon Bank, N.A. v. Metro Communications, Inc. 369
Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Prot. 128
Miller v. The Savings Bank of Baltimore 128
In re Mooney Aircraft 85
New England Coal & Coke Co. v. Rutland. 157
In re Newton 164
NLRB v. Bildisco & Bildisco 37
Nobelman v. American Savings Bank 114
In re Noonan 287

- Northern Pacific R.R. v. Boyd 183, 401, 404
Northern Pipeline Const.Co. v. Marathon Pipe
Line Co. 12, 414
Norwest Bank Worthington v. Ahlers 400
Ohio v. Kovacs 118
In re Orange County 377
Ortiz v. Fiberboard 72
Oldden v. Tonto Realty Co. 35
Patterson v. Shumate 289
Payne v. Wood 294
In re Philadelphia Athletic Club, Inc. 226
In re Piper Aircraft Corp. 76,79
In re Powerine Oil Co. 322,323
In re Public Service Co. of New Hampshire
225
In re Reid 295
In re Revco D.S., Inc. 226
In re Roco Corp. 361,363
In re Rodriguez 346
In re Rogers 254
In re Sharon Steel Corp. 227
Sindell v. Abbott Laboratories 125
- In re Smith 292**
In re Smith-Douglass, Inc.130
In re Snyder 279, 370
Sumy v. Schlossberg 261
In re Tarletz 22
Taylor v. Freeland & Kronz 293
In re UNR Industries, Inc. 62, 66, 67
In re U.S. Truck Co. 160,161,169
In re Taddeo 257
Toibb v. Radloff 282
Truck Drivers Local v. Carey Transportation,
Inc. 41
United States Bancorp Mortgage v. Bonner Mall
Partnership 186
United States v. Security Indus. Bank 279, 370
United States v. Whiting Pools, Inc.263
In re Voelker 298
Wade v. Bradford 115
Western Auto Supply v. Savage Arms, Inc. 84
In re Westpointe 96
In re Windsor Plumbing Supply Co. 95
Zerand-Bernal Group Inc. v. Cox 85

Table of Statutes

United States Constitution

U.S. Const. art. I, §8, cl. 4—3, 12

11 U.S.C.

Section

101(4)—65
101(5)—18, 25, 46–47, 58,66,77–78, 80, 87,
90, 119, 121,–123, 132, 134, 145, 301
101(9)—47, 50
101(12)—119
101(15)—50
101(16)—138
101(17)—138, 406
101(18)—396, 408, 410
101(19)—408, 410
101(20)—8, 410
101(21)—8, 410
101(25)—162
101(26)—366
101(31)—143, 146, 162
101(32)—361, 383
101(35)—283
101(36)—310, 341–342, 344, 389
101(37)—18, 117, 145, 389
101(40)—373, 378–380, 383
101(41)—8, 20, 47, 50
101(43)—51
101(49)—143, 199
101(50)—18, 310, 389
101(51)—17–18, 117, 137, 145, 237, 310, 389
101(51)(c)—237
101(53)—310, 341–345, 389
101(54)—277, 314, 316–321, 383
102(1)—198, 203
102(3)—20, 50, 137
102(5)—10, 25
103—10, 35, 267–268, 286, 288, 307, 369, 377,
383, 411
105—6, 125–126, 195, 228, 302, 420
107—135, 420
109—282
109(b)—20, 155, 236, 283, 383, 411
109(c)—284, 377–378, 380–383, 393–394
109(d)—8, 20, 155, 236, 283–284, 286, 383,
411
109(e)—229, 236, 283, 411, 413

109(f)—396, 408, 410
109(g)—302
301—20, 50, 236, 280, 282, 411
302—231, 236, 280, 282
303—135, 231
303(a)—10, 19–20, 50, 282, 285, 396, 411
303(b)—22, 47, 236, 280
303(h)—22–23, 282
303(i)—25
304—369
305—24–25
328—223
330—26, 224
341—195
342—56
348(f)—237, 241–242, 291
348(f)(2)—241–242
349(b)—383
350—221
361—98, 107, 109, 201, 387, 398–399, 407, 411
362—200, 201
362(a)—28, 96, 98–99, 122, 124–129, 180,
257, 264, 313, 364, 383, 387, 393–394,
400, 411
362(b)—28, 31, 98, 119, 124–129, 394
362(d)—411, 201
363(a)—84, 199
363(b)—29, 35, 90, 135, 192–203, 207, 210,
212, 261, 265, 279, 392
363(c)—199
363(d)—199, 201, 202
363(e)—198, 201, 212, 264, 265
363(f)—11, 29, 31, 84–85, 198, 261
363(h)—3, 261–262, 286, 291, 298
363(i)—261, 291, 298
363(j)—11, 261, 297, 298
363(k)—198, 291, 298
363(m)—194, 198–199, 206–207, 210–212, 223
363(n)—199, 211–212, 223
364—11, 135, 138, 143, 151–152, 154, 311,
370, 373, 387, 412, 417
364(b)—373
364(d)(1)—11, 135, 370
365(a)—11, 28, 31, 37–38, 40, 45, 134–135,
257, 287–288, 393
365(b)—11, 31–35, 134–135, 393

- 365(c)—11, 135
 365(d)—32, 35, 39, 135
 365(e)—11, 35, 135
 365(f)—34, 35
 365(g)—34, 135
 365(h)—31, 33, 45, 135
 365(i)—135
 365(j)—135
 365(k)—135
 365(l)—135
 365(n)—32, 36, 45
 366—160, 277, 412
 501—25, 35, 89, 96, 132, 134, 145, 237, 362
 502(a)—25, 31–32, 35, 59, 87–89, 117, 132, 134, 237, 269, 349
 502(b)—23, 31–32, 34, 38, 45, 52, 59, 87, 89, 102, 117, 127, 132, 237, 349
 502(b)(2)—89, 102
 502(b)(6)—34–35, 89, 135
 502(b)(7)—36, 38, 45, 87
 502(c)—25, 47, 52, 59, 88, 90–92, 94–96, 117, 132
 502(g)—135
 503—34, 87, 100–101, 104, 143, 224, 387
 503(b)(1)(A)—34, 87, 100–101, 224
 506(a)—18, 51–53, 88, 97–98, 102–110, 113–115, 117, 134, 145, 180, 299, 324, 401, 404, 408–413
 506(b)—102–104, 134–135, 399
 506(c)—102, 104, 392
 506(d)—113, 299, 382
 507—34, 51, 87, 100–104, 131, 134–135, 143, 145–146, 169–170, 224, 267, 309, 313, 394
 507(a)—34, 87, 100–101, 103, 131, 134, 143, 145–146, 169–170, 224, 267, 309, 313, 394
 507(a)(1)—34, 87, 100–101, 103, 131, 134, 143, 224
 507(a)(3)—87, 134, 394
 521—145
 522—3, 32, 185, 240, 243, 248, 256, 261–263, 269, 272, 275–277, 279–280, 286, 289–293, 295–298, 301, 343, 382, 392
 522(b)—3, 261–262, 269, 286, 290, 292–293, 298, 343
 522(b)(2)(B)—3, 261–262, 286, 290, 298
 522(d)—185, 240, 248, 262, 269, 272, 276, 289–293
 522(f)—32, 263, 277, 279–280, 295–297, 343
 522(f)(1)(A)—277, 279–280, 295–296
 522(f)(1)(B)—277, 279–280, 295
 523—47, 87, 119, 122, 135, 251–253, 267, 277, 280, 296, 299, 303–305
 523(a)—47, 119, 251–253, 267, 277, 303–305
 523(a)(2)—277, 303–304
 523(a)(4)—251–253, 303
 523(a)(5)—296, 303, 305
 523(a)(8)—277, 303
 523(a)(9)—303
 523(a)(15)—303, 305
 524—56, 59, 69–72, 74–76, 81, 83, 85, 87, 95, 117, 272, 276, 280, 299, 301
 524(c)—272, 276, 280, 299
 524(d)—276, 280, 299
 524(e)—70, 85
 524(g)—56, 70–72, 74–76, 81
 524(h)—56, 70–71, 74
 525—277, 412
 541—8, 28–30, 51, 90, 103, 200–201, 203, 231, 237, 241, 260–263, 265–266, 268–269, 271, 277, 280, 286, 288–295, 308, 314, 393–395, 420, 426
 541(a)(1)—29, 90, 103, 237, 241, 260, 265–266, 280, 288–289, 291, 293, 295, 308, 314
 541(a)(3)—237, 277, 291, 314
 541(a)(5)—241, 280
 541(a)(6)—8, 231, 237, 280, 286, 294
 541(b)(1)—291
 541(c)—289–290
 541(d)—266
 542—263–269, 312–314, 382, 416, 420–421
 543—264, 266, 382
 544—267, 277, 309, 332, 338, 340–341, 344–345, 347–347, 353–360, 363, 370, 382, 392, 419
 544(a)(1)—340–341, 344–345, 349, 360
 544(a)(2)—340–341, 344–345, 382
 544(a)(3)—277, 341, 345, 347–348, 360, 419
 544(b)(1)—353, 355
 545—121, 267, 297, 309, 313–314, 332, 341, 345, 360, 363, 370, 382, 392, 395
 546—331–332, 334, 384
 547—186, 266, 277, 309, 314–316, 318–336, 338, 345, 360, 363–364, 368–370, 382–383, 392, 419
 547(b)—186, 277, 314–316, 318–321, 323–324, 326, 328–336, 345, 368, 383, 419
 547(c)—186, 315, 318, 321–325, 328–336, 383
 547(e)—334, 345
 547(f)—314
 548—112, 209, 237, 266, 291, 309, 349–353, 356, 358–368, 370, 382, 392
 548(a)(1)(A)—237, 291, 365, 368
 548(a)(1)(B)—237, 291, 361–363, 365, 368
 548(d)—291, 360–361, 363
 549—267, 313, 332, 382
 550—277, 314, 355–358, 361, 382, 384
 551—382, 419
 552—384, 386, 388–389, 392–393, 395, 420
 553—359, 382–383
 554—129–130, 132, 275, 280
 558—132
 701—22
 702—22, 198, 279
 704—36, 198, 237, 272, 279, 308
 706—25, 287, 299, 306
 707—230–233, 241–243, 246, 258, 280, 306

- 707(b)—230–233, 241–242, 246, 258, 280, 306
721—36, 279
722—275–276, 280, 299
724(a)—382
726—34–35, 87, 224, 272, 279, 309, 366
727—19, 47, 83, 117, 121–122, 135, 245, 256,
277, 280, 291, 299–305
727(b)—47, 119, 280
901—373, 377, 383–384, 387–388, 393–394
903—377, 388, 392–395
904—377, 386–387, 392–395
922—384, 394
926—384, 393–394
927—383
928—383–384, 389
941—383
943—395
944—83
1101—22, 37, 118, 180
1102—137–138, 198, 223–224, 237, 284
1103—138, 198, 223
1104—22, 28, 223, 228, 284
1106—36, 198, 223, 308
1107—22, 36–37, 112, 135, 193, 198, 200, 350
1108—36, 135, 198, 200
1109—60–62, 65–66, 87, 137, 156, 198, 223
1111—18, 115, 117, 180, 185, 383, 409–410, 413
1111(b)(1)—185, 383, 413
1111(b)(2)—18, 180, 383, 409–410, 413
1112—58, 118, 198, 285
1113—36, 40–45, 393
1114—41
1121—135, 137, 158, 180, 187, 237, 417
1121(b)—180, 187
1121(c)—180
1121(e)—137, 158, 237
1122—88, 135, 160, 163–165, 178, 180, 413
1123—36, 51, 68, 114–115, 135–136, 146, 185,
197–198, 203, 219, 256, 286, 350, 354,
383, 393, 407, 412
1123(b)—115
1123(b)(5)—114–115, 136, 256, 286, 407
1124—88, 135–137, 162, 170, 178, 181, 256, 383
1125—136–138, 140, 142, 157, 178, 198,
201–202, 237, 399
1125(b)—136, 157, 399
1125(d)—138
1125(e)—138
1125(f)—137, 237
1126—88, 91, 93, 95, 135–136, 153, 156, 160,
163, 181, 189, 198, 201–202, 404, 411, 416
1126(c)—88, 93, 95, 135–136, 153, 163, 181,
189, 404, 411
1126(d)—135–136
1126(e)—95
1126(f)—136, 160
1126(g)—156
1127—136, 148
1128—137, 198
1129(a)—34, 43, 59, 87–88, 93, 135–137, 143,
146, 152–153, 156, 160, 162, 167, 181, 185,
191, 197–198, 201–203, 210, 219, 221, 279,
285–286, 292, 313, 357, 395, 413, 416–417
1129(a)(3)—59, 210
1129(a)(6)—395
1129(a)(7)—87–88, 153, 181, 185, 201–202,
285, 292, 413
1129(a)(8)—88, 135–136, 156, 160, 162, 181
1129(a)(9)—34, 87, 143, 146, 198, 224, 313
1129(a)(10)—136, 143, 160, 162, 181, 191, 416
1129(a)(11)—43, 136, 153, 167, 197–198, 203,
279, 286, 357, 407, 413, 417
1129(b)—52–53, 68, 73, 88, 93, 98, 104–105,
111, 115–117, 136, 152–153, 156, 158,
160, 162, 166, 180–182, 184–185,
189–190, 198, 201–202, 219, 286, 340,
399, 401–405, 407, 409–411, 413, 416–417
1129(b)(1)—136, 181, 401
1129(b)(2)—53, 68, 73, 88, 105, 111, 115–117,
153, 180–181, 182, 184–185, 189–190,
198, 201–202, 340, 401, 403–405, 407,
409–411, 413, 416–417
1129(b)(2)(A)—53, 105, 111, 115–117, 185,
198, 340, 409–410, 413
1129(b)(2)(A)(i)—53, 115–116, 198, 340,
409–410
1129(b)(2)(B)—68, 73, 88, 105, 153, 180–182,
184–185, 189–190, 201, 340, 401,
403–405, 407, 411, 416–417
1129(b)(2)(B)(i)—181, 185, 340, 401, 411, 416
1129(b)(2)(B)(ii)—68, 105, 180–181, 184–185,
189–190, 340, 401, 403–405, 407, 411, 416
1129(c)—136, 152, 158, 198, 417
1141—8, 19, 35, 47–49, 56, 59, 69, 80, 83–88,
91, 95, 117, 124, 128, 135, 137, 179, 305
1141(c)—84–86
1141(d)—8, 19, 35, 47–49, 56, 80, 88, 91, 95,
117, 124, 128, 137, 305
1141(d)(1)(A)—19, 47, 91, 124, 128
1141(d)(2)—8, 47, 91, 137, 305
1141(d)(3)—35, 305
1201—406
1202—308
1205—407, 411–412
1205(b)(3)—407, 411–412
1222—115, 256, 407–409, 412–413
1222(b)(2)—115, 256, 407–408, 412–413
1225—408, 411–413
1228—83, 117
1301—236
1302—237, 308
1303—237, 369
1305(a)(2)—238
1306—8, 231, 237, 241–242, 286, 291
1306(a)(1)—241
1306(a)(2)—8, 231, 237, 241, 286

- 1307—237, 291
 1307(a)—237, 291
 1321—237, 242
 1322—114, 163, 238, 241, 244–245, 255–259, 272, 285–286, 299, 398, 407, 409
 1322(b)—114, 163, 238, 256–258, 272, 286, 299, 407
 1322(b)(1)—163
 1322(b)(2)—114, 256–258, 272, 286, 407
 1322(b)(3)—257–258, 299
 1322(b)(5)—256–258, 272, 299, 407
 1322(c)—244–245, 255, 258, 407, 409
 1322(d)—238, 241, 286, 398
 1322(e)—258–259, 409
 1323—237, 241
 1324—241
 1325—107, 109–110, 230, 232–234, 238–249, 252–256, 258–259, 275, 286, 292, 298, 302, 398
 1325(a)(3)—233, 238–241, 244, 252–253, 255, 302
 1325(a)(4)—239–241, 243–244, 253–254, 256, 292, 302
 1325(a)(5)—107, 109–110, 239–241, 258, 275, 298, 302
 1325(a)(6)—239, 259, 302
 1325(b)—232, 240–242, 244–249, 253–254, 286, 398
 1325(b)(1)(B)—247, 398
 1325(b)(2)—247
 1326—237, 242
 1328—8, 47, 83, 117, 230, 234, 238, 240, 251–253, 277, 291, 301, 304–305
 1328(a)(2)—251, 277, 305
 1328(a)(3)—251
 1328(b)—234, 240, 253, 305
 1328(c)—234, 253, 305
 1329—241
 1334—86
- 18 U.S.C.**
Section
 152—225, 294
- 28 U.S.C.**
Section
 157—46, 75, 86, 90, 272, 414–416, 418–420, 422–427
 157(a)—86, 414, 418, 426
 157(b)—46, 75, 90, 272, 415–416, 418–419, 422, 424, 426
 157(b)(1)—90, 415, 418–419, 426
 157(b)(2)—75, 90, 272, 415–416, 418–419, 422, 424
 157(b)(3)—415, 418–419
 157(b)(4)—415, 418
 157(c)—90, 415, 416, 419, 426–427
 157(d)—419
 157(e)—419–420, 423–425
- 1334(a)—414
 1334(b)—86, 414, 426
 1471(b)—414
 2075—193, 414
- Bankruptcy Reform Act of 1994, Pub. L. No. 103-394**
Section
 105—27, 195
 111(a)—70–71, 74
 111(b)—71–72, 81
- Uniform Commercial Code**
Section
 1-201(21)—317
 3-104—317, 320
 3-104(1)—317
 3-122(3)—317–318
 3-409(1)—317
 3-802(1)(b)—317
 4-215(a)—317
 4-402—317
 5-106(c)—322
 5-106(d)—322
 9-102(a)(2)—311, 420
 9-309—328
 9-502—339
 9-609—110
 9-620—18, 110
 9-621—110
 9-623—276
 9-624—110
- Internal Revenue Code**
Section
 731—361, 362
 6323—313
- State Statutes**
Il. St. Ch.735, Art. 5
Section
 12-1001—273
 12-1201—269
 12-901—269
- M.G.L.A. ch.188**
Section
 1—269
 2—269
 34—274, 276
- NYC.P.L.R.**
Section
 5205—277
 5206—270
- NY Debt.& Cred.**
Section
 284—270

Foreword

Bankruptcy for the 21st Century

To the Hesitant or Reluctant Reader

Bankruptcy is regarded in the same way as shrouds and undertakers: necessary but unpleasant, perhaps even grim. A decent burial for a moribund company, a shameful end for an individual's social status are still, at least in part, the thoughts evoked by the word.

Bankruptcy under the Bankruptcy Code of 1978, however, is far different from what it was under the prior Bankruptcy Act of 1898.¹ If history is any guide, this 1978 Code, amended from time to time, will guide us well into the 21st century. Its emphasis is not on interment but rather on resuscitation. It focuses not on liquidation of assets but on payment from future income.

With this dramatic shift in policy, bankruptcy becomes analogous to medicine. Just as the medical doctor prescribes treatment to restore a patient, the bankruptcy lawyer recommends sale of needless assets and termination or rejection of unprofitable contracts. In both fields, the purpose is the same: save the patient through treatment that will restore health and promote longevity.

Bankruptcy has played and continues to play as great a role in the nation's economic health as medicine does in the nation's personal health. Therefore, the emphasis of this book will be on the remedies (treatments) available to debtors, creditors and equity holders under the Bankruptcy Code.

A Note on Methodology

The key purpose of this book is not only to present issues encountered frequently in bankruptcy, but also to develop effective methodologies to resolve those issues. The principal object is to direct the reader's attention to relevant state and federal statutory materials, as one cannot effectively dissect a fact pattern without having a full under-

1. The words "Bankruptcy Code" or "Code" will always refer to the Bankruptcy Code of 1978, which was created by the Bankruptcy Reform Act of 1978, as amended through April 2002. The words "Bankruptcy Act" or "Act" will always refer to the Bankruptcy Act of 1898.

standing of the statutory provisions. Because of this, the student should have a current copy of the Bankruptcy Code for use with this book.

This book focuses on problems and statutes rather than on cases. The author proceeds on the basic assumption that far too much time is wasted studying cases. In bankruptcy, such time is better spent studying the statutes as basic principles of law. Students should understand that the law of bankruptcy derives from the statutes and should rely on the cases presented herein only to the extent that the cases clarify or interpret statutory language.

The goal of these materials is to present students with substantive and procedural bankruptcy as an integrated whole rather than in fragments. The materials and class sessions are designed to enable the student to see how specific provisions came to be included in the Code and how those provisions fit into the overall scheme and purpose of the legislation.

Excellent students can perhaps, in one or two statutory courses, spend the necessary time to read and learn cases well enough to discuss them and, at the same time, fit together the statutory pieces so that they make a coherent whole. The pressures of time, however, make this process difficult at best. If students do not do this, they are left with a fragmented knowledge of the law, no matter how much time they spend reading and studying the cases in the casebook. Moreover, they are misled. They see the cases as their primary source, when in fact the source is the statute. And consciously or unconsciously, they come to the conclusion that the cases have some special significance beyond the illustration and interpretation of principles that can be found most easily in the statutes on which they are based.

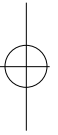
Hence, this course will depart from the case-oriented approach. Emphasis on statutory principles and construction will replace emphasis on cases. Statutes will be primary; cases secondary.

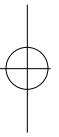
Throughout the book, cases have been extensively edited without, in most cases employing editing symbols to note deletions, and footnotes in cases have been renumbered. The United States Code, Uniform Commercial Code and other cited statutes in effect in Spring 2002 have been used. However, statutes, including the Uniform Commercial Code, cited and quoted in cases have not been updated to their most recent version from the version used in the cases.

I am very grateful to all my students at Boston University School of Law and especially to my research assistants who over the years have contributed so much to the writing of this book. Particularly, I thank Shannon Martin, class of 2002, John Hoffman, class of 2003, and Courtney O'Brien, class of 2004. Shannon has worked with me continuously on this and other projects for the past two years, edited all of the manuscript, did much of the research and made many valuable suggestions. John also provided much valuable assistance over the past year. Courtney copyedited the page proofs and proofread the tables and index. Other research assistants who in past years did much to bring this book to fruition include David Goodearl, Raisha Vaidya, Barbara Van Gorder, David Hales, Manjusha Kulkarni, Carl Eibl, Mark Weiss, Marcy Axelrad, Eric Underriner, Lisa Barr, Jeffrey Cymbler and Gary Thompson. I am also grateful to all of my students, past and present, who have contributed so much over the years. All cannot be named.

Our faculty services manager, Linda Skinner, as always was there to help, not only coordinating the work of the secretaries but proofreading much of text herself. Faculty secretaries, Ken Westhassel, Scott Hankins, Carl Hanson, Sean Bennett and Holly Escott all played a key role in bringing the book to publication.

Most of all my thanks to my wife, Anne, not only for the encouragement, support and inspiration every writer needs to get the work done but also for her excellent research on Enron. Without her, I doubt that this book would have been written.





Preface

Debt, and the struggles of debtors to repay it and creditors to collect it, is a worldwide problem. Although this book focuses on American debt collection processes employed by creditors and debtors using the United States Bankruptcy Code, the American model is being studied and implemented elsewhere. Moreover, this model is being considered as a means to help debtor nations restructure their debt without disrupting their economies.

On November 26, 2001, the First Deputy Managing Director of the International Monetary Fund, Anne Krueger, suggested to a meeting of the National Economists' Club in Washington, D.C., that a mechanism be developed to allow countries in financial difficulty to obtain legal protection from creditors who are seeking to collect their debts.¹ The purpose of the protection would be to allow a country the opportunity to restructure its finances without having to fend off lawsuits. The duty of the country receiving this protection would be to negotiate in good faith with its creditors.

The basis for this proposed relief is Chapter 11 of the Bankruptcy Code, with which we will open our studies. Chapter 11 has as its theme negotiation between creditors and the debtor. Creditors are stayed from suing the debtor who is under the protection of Chapter 11. Creditors advancing money to a debtor in Chapter 11 are often given precedence over existing creditors in repayment. Once a restructuring agreement has been reached, all creditors are bound by it.

These same ideas were outlined in Ms. Krueger's speech. Although the solution to the problem of enforcing an international body's determination could be difficult to develop, the model for its success is Chapter 11, a remedy which for over two decades has been a dominant force in the revitalization of many struggling American businesses.

On April 1, 2002, Ms. Krueger expanded on her ideas at a conference on "Sovereign Debt Workouts: Hopes and Hazards" at the Institute for International Economics in Washington D.C. She unveiled a plan that would require a "single international judicial entity that could arbitrate disputes and oversee voting."²

U.S. Treasury Undersecretary John Taylor, apparently speaking for the Bush administration, reacted unfavorably to such an entity. He stated, "A decentralized approach... makes more sense and is much more workable."³ As reported in the Washington Post, "Under the administration's proposal, countries would negotiate changes...so they could strike deals with their creditors."⁴ What would not be in the Taylor proposal

1. IMF Survey, Vol. 30, #23, Dec. 10, 2001, at 385.

2. "New Approaches to Sovereign Debt Restructuring: An Update to Our Thinking" <http://www.imf.org/external/np/speeches/2002/040102.htm>.

3. Paul Blustein, *IMF Crisis Plan Torpedoed; Treasury Official Rejects Proposal a Day After It Is Advanced*, WASHINGTON POST, April 3, 2002 (available at WL 17587409).

4. *Id.*

would be the international judicial body to enforce creditor/debtor settlements. Confusing the situation further, about a week later, another U.S. Treasury spokesperson said, “It was his [Taylor’s] intention to be encouraging [about the IMF plan].”⁵

The United States is the dominating nation within the IMF, holding 17.5% of the vote. Therefore, Ms. Krueger’s debt restructuring proposal will not pass without the approval of the United States.⁶ The United States favors change to the current system, but not by granting increased and centralized power to IMF.⁷

At the spring meeting of IMF members a compromise was reached.⁸ The proposal was broken down into two tracks. The first track, resembling Mr. Taylor’s proposal, is the “market oriented approach”. This approach will place bond clauses in debtor-creditor contracts such that creditors will agree to comply with a debt restructuring should one become necessary. The second track, not yet completed, will be to spend further work investigating the possibility of creating treaties and changes in national legislation to aid the debtor-country.

With regard to the second track, Ms. Krueger has proposed the creation of a “dispute resolution forum”, independent of the IMF, which would handle negotiations between debtor-countries and their creditors, and also disputes as to the validity and amount of creditors’ claims. As of Fall, 2002, such a forum has not yet been implemented. Whatever results, negotiation is at the heart of Chapter 11. The need for some way to deal with international financial crises is recognized by both parties. The United States Bankruptcy Code may yet become the model for financial restructuring on a worldwide basis.

5. Paul Blustein, *IMF Reform Plan Makes Comeback; U.S. Eases Stand on ‘Bankruptcy’ Idea*, WASHINGTON POST, April 9, 2002 (available at WL 17588595).

6. *Bankrupt Veto*, FINANCIAL TIMES (London), April 4, 2002.

7. Martin Wolf, *Debt to the World*, FINANCIAL TIMES, April 24, 2002.

8. *IMF’s Krueger Proposes New Body to Aid in Emerging Market Debt Restructuring*, AFX EUROPEAN FOCUS, June 6, 2002.