

Consider . . .

BANKRUPTCY BASICS

Like many areas of the law, bankruptcy has its own special language and rules that can be confusing for those who lack experience. While bankruptcy can involve extremely complicated issues, knowing a few of the basic concepts will help most people who only occasionally deal with bankruptcy.

First, bankruptcy is solely a creation of federal law. While bankruptcy may look occasionally to state law for a few concepts (such as the definitions for property rights), it is generally controlled by federal statutes. A petition for bankruptcy (“filing bankruptcy”) can only be filed in federal Bankruptcy Court.

Bankruptcies can generally be placed into one of two types: reorganization (Chapter 11 and Chapter 13) or liquidation (Chapter 7). While there are other types, these are by far the most common.

One of the most important bankruptcy aspects is that, upon filing the petition, all assets of the debtor become property of the bankruptcy estate. In a Chapter 7, the trustee retains control of the assets during the liquidation process. In a Chapter 11 or a Chapter 13, the debtor retains control of the assets, subject to oversight by the trustee.

Because all of the assets become property of the bankruptcy estate, federal law prohibits any action against the assets by creditors. This is known as the “automatic stay” and means that any existing actions are put on hold and most collection actions are prohibited without prior approval by the bankruptcy court. For example, if you receive notice that someone who owes you money has filed for bankruptcy protection, you should cease any collection efforts, including sending copies of invoices. Violations of the automatic stay can result in serious penalties.

One item to note is that some limited efforts to enforce construction lien or bond rights may be

permitted despite the automatic stay. Before undertaking such efforts, however, you should consult with an attorney who practices in this area.

Federal law generally allows the bankruptcy trustee to look back 90 days before the date the petition was filed. The trustee can attempt to undo certain transactions that occurred during this period (known as the “preference period”). In other words, if the debtor paid you money during this time, the trustee may attempt to force you to give that money to the estate. While there may be defenses to that claim, you must give the money to the trustee unless you can prove the transaction fits within one of the statutory exceptions. Note that this “preference power” can reach back a full year for transactions involving insiders.

If a debtor successfully concludes the bankruptcy process, he will be granted a “discharge.” (Corporations and other business entities that complete a Chapter 7 are liquidated and do not receive a discharge.) The scope of the discharge will depend on a number of factors, including whether it was a Chapter 7, or a Chapter 11 or 13 bankruptcy plan.

LITIGATION: PART 2 OF A SEVEN-PART SERIES

This article (Part 2 of our seven-part series on litigation) is on “**Preparing a Lawsuit.**” In general, there are three steps to prepare a lawsuit: (1) Gather the factual information; (2) Research the law; and (3) Draft and file the complaint.

1. Gather Information. The first step, gathering the factual information, is the most important one. While some parties may feel that the other side in a dispute is totally wrong about what occurred, one of a court’s primary roles is listening to two different arguments about prior events and making a ruling in favor of one party’s version. Until we invent a

different legal system, this scenario will remain an aspect of all legal disputes.

This first step is one where the client's involvement is absolutely critical. Despite what some parties may think, lawyers do not make up facts nor are they permitted to change them. What lawyers may do, however, is emphasize the importance of one fact over others.

For the client to best utilize the lawyer's services, the information should be gathered and organized in a logical fashion (often in chronological order). Just as you do not want to give the proverbial shoebox of receipts to your accountant, you do not want to give a bunch of disorganized records to your attorney.

Clients should recognize that the attorney may undertake some independent investigation into the underlying facts. This is not because the attorney thinks the client is mistaken about what happened; it is because different people may have different recollections of the same events and because different people may have different records of the same events. A certain amount of independent investigation (where appropriate) can be a hallmark of a good attorney.

2. Research. The second step is for the attorney to research the relevant law. In some instances, the attorney may be very familiar with the type of matters at issue and may not need much legal research. In other situations, a great deal of legal research may be necessary.

A client should determine early on what kind of experience the attorney has in matters such as the one at hand. If the client is not familiar with the attorney, he should ask how much the attorney practices in that particular area of law.

3. File suit. The third step is to prepare and file the lawsuit (also known as filing a complaint). Drafting lawsuits involves a number of tactical and strategic decisions. For example, the attorney may include alternative theories of relief, some of which may appear to be incompatible at first glance.

Another decision is which court to file the lawsuit in. The first choice is federal versus state court. In some instances, there is no choice about

state versus federal court. The second choice is where to file the lawsuit; on a state level, this means which county. Even a choice as apparently simple as this may involve numerous tactical and strategic decisions.

Of course, the parties' agreement may call for arbitration of dispute or for specific venue. Thus, there may be limits on some of these decisions and choices. Further, Oregon law concerning construction liens also may place some constraints on these decisions.

Once the complaint is filed, it is time to serve it on the defendants. This is the subject of Part 3 of this series (in our next newsletter).

FIRM NEWS:

HOURLY RATES: For files opened after December 15, 2004, the following hourly rates apply: Michael J. Scott, \$225; Douglas R. Hookland, \$225; Thomas J. Murphy, \$205; Alan L. Mitchell, \$185; Douglas L. Gallagher, \$185; Kevin T. Christiansen, \$155.

ALAN L. MITCHELL will speak at a February 4, 2005 seminar in Portland for Lorman Education Services entitled "The Fundamentals of Construction Contracts in Oregon." Mr. Mitchell will address the topic of "Basic Contract Principles." If you would like a brochure, please contact this office.

MICHAEL J. SCOTT will speak at a February 11, 2004 seminar in Portland for the Seminar Group as part of a two-day presentation entitled "Oregon Construction Law." Mr. Scott will address the topic of "Lien and Bond Claims." If you would like a brochure, please contact this office.

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