

EXAMPLES & EXPLANATIONS

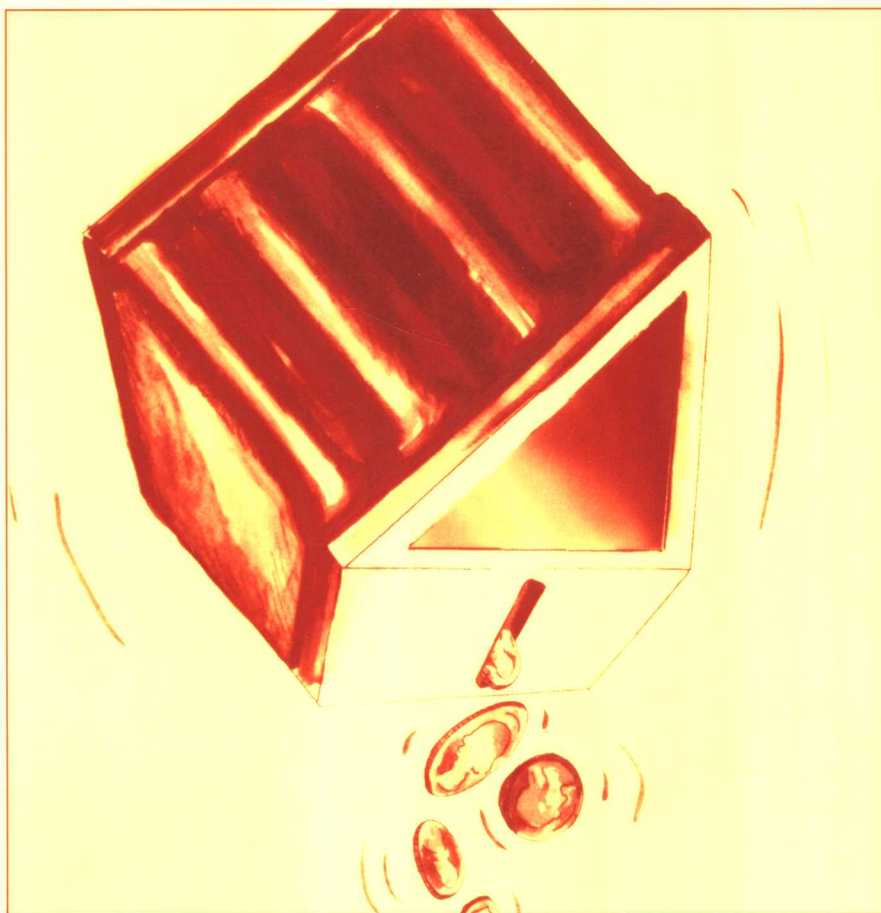
# 破产法与债务人 / 债权人

## Bankruptcy and Debtor/Creditor

第二版

[美] 布赖恩·A·布卢姆 / 著  
(Brian A. Blum)

案例与解析 影印系列



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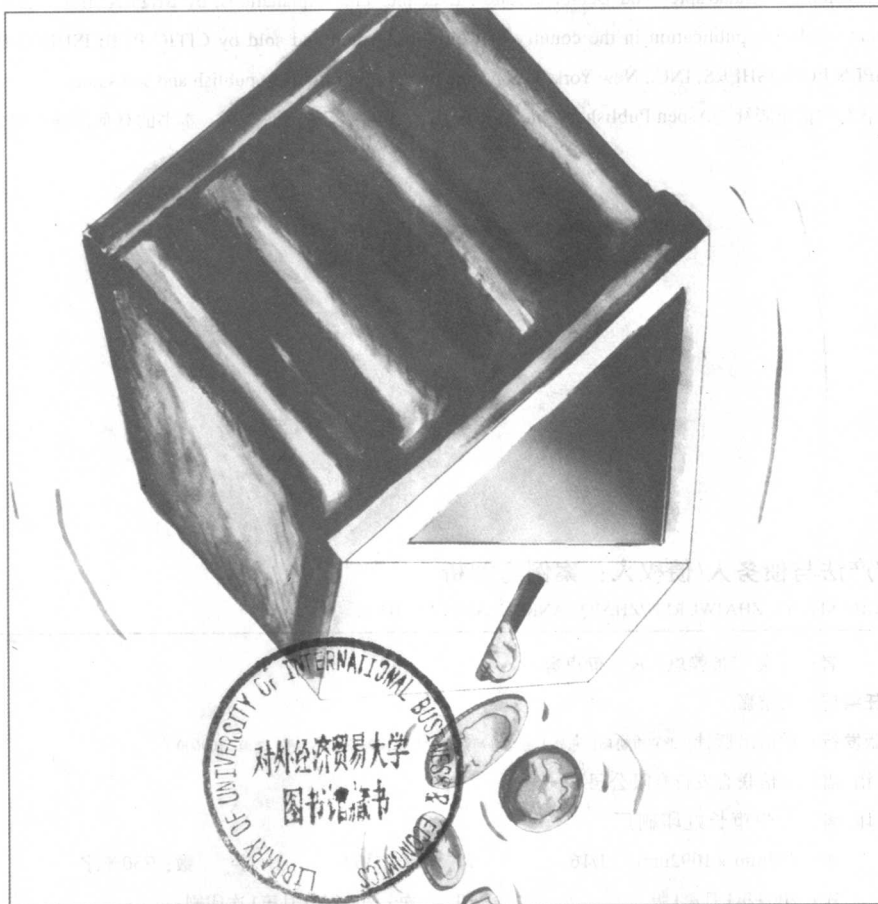
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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%~10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者

读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

## INTRODUCTORY NOTE FOR THE CHINESE EDITION OF BANKRUPTCY AND DEBTOR-CREDITOR LAW: EXAMPLES AND EXPLANATIONS

Brian A. Blum

This book is designed for use by American law students who study bankruptcy and debtor-creditor law. Like most subjects in American law schools, bankruptcy and debtor-creditor law is not taught by lecture. Instead, students are assigned readings in advance of class, which include cases, statutory materials, and often also problems and questions. Class time is spent discussing the materials assigned, and students participate in the class by answering or asking questions, by explaining what they have read, or by solving problems. This book is most commonly used by students to supplement the readings and discussions in class, in preparing for class, and in enhancing their understanding of what was said in class. The text of the book explains concepts and principles of law. At the end of each chapter there is a set of Examples and Explanations. The Examples present factual problems that are based on the principles set out in the text, and the Explanations then suggest how those problems might be analyzed and solved. The purpose of the Examples and Explanations is to provide illustrations of how the legal principles may be applied, and to allow students to try to use the legal principles in resolving disputes or questions.

The legal system of the United States of America is derived from the Common Law of England. This occurred because when English colonists settled in America, they imported the legal system with which they were familiar. As a result, the approach and thinking of an American lawyer is very different from a Chinese lawyer, whose legal system is based on the Civil Law. This means that even where the actual rules of American and Chinese law may be similar, the way in which the rules are established, ascertained, and applied in the American legal system are quite different. One of the most notable differences lies in the use and application of court decisions. Even where American law is set out in a statute or code, the courts play an important role in developing legal rules within the framework of the statute by applying and interpreting the law.

This book covers bankruptcy and debtor-creditor law. Bankruptcy law is enacted by the United States Congress, and is federal law. However, most of the rest of the law governing the relationships between debtors and creditors is state law. To see the importance of this distinction, you need to understand the basic principle on which the federal system of government works in the United States. The United States is a federation. Under the United States Constitution, The federal government has limited powers, so that many important areas of the law are within the jurisdiction of the individual states. The laws governing the relationships between private parties are primarily governed by state law, including most of the rules and procedures that creditors must follow to collect payment of their debts. However, the United States Constitution confers on the United States Congress the power to make bankruptcy law. Therefore, once a debtor becomes bankrupt, the bankruptcy case is dealt with in the federal court system, and the rules of

bankruptcy law are federal. This means that the study of bankruptcy law in the United states involves both the study of the federal law of bankruptcy, and the state law that applies to the rights that are dealt with in the bankruptcy case.

Some state debtor-creditor law is statutory, but some of it has been developed in the courts, and has never been enacted by statute. Federal bankruptcy law is statutory, and the statute is often referred to as the "Bankruptcy Code" . However, this code is not the same conceptually as codes in Civilian countries. First, there is no comprehensive codification of American law, so statutes like the bankruptcy code are discrete enactments, that cover only a specific area of the law. Second, many of the rules and principles of statutory law cannot be found in the language of the statute itself, because they are developed by courts as they apply the statute in individual cases. Courts must follow the statute, but are commonly called on to resolve questions that are not specifically provided for in the statute, so they must reach a conclusion by analysis and legal reasoning. As they do this, they create a set of laws that supplement those that are set out in the statute. This power of the courts to make law is a particular feature of the Common Law system. When a case is decided by a court of sufficient seniority, the case becomes a precedent for later cases involving that issue. That is, the rule established by that case becomes the law, to be followed if the same question arises in a future case. Because courts create legal rules, the study of law in America involves the reading and analysis of many court opinions. The importance of judge-made law is reflected in this book. You will notice that it does not merely refer to sections of the Bankruptcy Code, but also discusses court opinions that interpret those provisions.

Having briefly explained some of the general features of the American legal system, this introduction now turns to a more specific overview of the subjects covered in this book. As mentioned above, debtor-creditor law is concerned with the creditor's enforcement of debts, which are usually defined as monetary obligations. If a debt is unpaid when due, and the creditor cannot obtain payment by demand or negotiation, the creditor's only means of enforcing payment is by proceedings in court. State law sets out the rules and procedures that the creditor must follow in trying to collect the debt. The first four chapters of this book set out the general principles and explain the fundamental concepts of state debtor-creditor law.

If the debtor becomes bankrupt, federal bankruptcy law applies and takes precedence over state debt-collection law. All efforts that creditors had been making to collect debts under state law must cease, and claims against the debtor must be dealt with by a specialized bankruptcy court. The rest of the book deals with bankruptcy law and covers the proceedings and issues that arise in a bankruptcy case. Chapters 5 and 6 set out general basic principles and policies, and the remaining chapters deal with specific aspects of the bankruptcy case.

Although all these matters are discussed in greater length in the book, it may be helpful to set out a broad introduction to bankruptcy here. Bankruptcy is a system of laws and procedures designed to deal with

the management and settlement of the debts of a person who is in serious financial difficulty. This person may be either an individual (a natural person) or a corporate entity. One of the constant concerns of bankruptcy law is to balance the need to help the debtor to manage financial trouble while at the same time protecting creditors by preserving the assets of the estate and providing for the fair and orderly settlement of claims. Bankrupt debtors are usually insolvent (their liabilities exceed their assets), so most claims are not fully paid, and the question of how creditors share in the limited resources of the estate is an important theme.

The bankruptcy case begins by the filing of a petition in bankruptcy court. Most bankruptcies are voluntary-the debtor files the petition seeking bankruptcy relief. However, there is a procedure under which qualified creditors can force the debtor into bankruptcy by means of an involuntary petition. Immediately upon the filing of the petition, all creditors are bound to bankruptcy's collective process for dealing with the debtor's financial obligations, and are forbidden from taking any further action to recover their claims outside the bankruptcy proceeding. They submit their claims to the estate, to be handled by the trustee (the impartial person appointed to administer the estate) in accordance with bankruptcy law.

The Bankruptcy Code provides for two distinct forms of relief - liquidation and reorganization. If the estate is liquidated, the trustee realizes the property of the debtor in the estate and distributes its proceeds to creditors in accordance with the rank of claims. If the debtor reorganizes in bankruptcy, the estate is not liquidated, but instead the debtor is able to keep some or all assets in return for a commitment under a plan to distribute money or property to creditors. Payments are typically made in installments over a period of time and are commonly derived from income earned by the debtor during that period. The Bankruptcy Code generally encourages rehabilitation rather than liquidation because Congress believes that rehabilitation usually enhances creditor recovery, and it best serves the interests of the debtor, creditors, and society. One of the fundamental policies of bankruptcy law is to allow the debtor a "fresh start". Therefore, bankruptcy discharges (releases) a debtor who has complied with the law from the unpaid balance of all or most of the debt handled in the case.



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# Preface

## ***Bankruptcy and Debtor/Creditor, Second Edition***

This book deals with bankruptcy law and debt collection. I have aimed to keep the level of discussion and analysis appropriate to a basic bankruptcy or debtor/creditor course. I have been guided by my many years of teaching bankruptcy law and by the content of published casebooks. This book covers all the topics a student might encounter in a bankruptcy or debtor/creditor course.

Since the first edition of this book was published in 1993, there have been a number of changes in bankruptcy law. Quite apart from the development of case law, there was a fairly extensive amendment to the Code in 1994, as well as smaller, more discrete amendments at various other times. This edition incorporates these changes. Another significant development addressed in this edition is the 1997 report and recommendations of the National Bankruptcy Review Commission and the legislative proposals that it has generated. The Commission's work and its recommendations have reinvigorated debate and triggered a reevaluation of many aspects of the Code.

Most of the alterations in this revision are intended to bring the book up to date without drastically changing the extent and nature of the material covered in the first edition. Material that had become stale has been eliminated to make room for issues that have come more sharply into view. There has also been some expansion of coverage, particularly in the chapter on jurisdiction and court powers.

## ***Both State and Federal Bankruptcy Law***

Debtor/creditor law encompasses both state debt collection and federal bankruptcy law. Although some law school courses omit the state law component in favor of more extensive bankruptcy coverage, most, it seems, devote some attention to debt collection under state law as well. This gives students the advantage, not only of acquiring a general knowledge of state debtor/creditor law — very useful for its own sake — but also of becoming familiar with concepts that are vital to an understanding of bankruptcy law.

This book, therefore, begins with coverage of the general principles of state law. It treats this subject in a broad and condensed way, and emphasizes general themes and key concepts. It focuses on aspects of state law that are key to the understanding of bankruptcy law. This level of detail should

be sufficient for most courses that include a component on state debtor/creditor law. It should also make the concepts and procedures of state law accessible to students whose course omits state law, but who would like to do some background reading on the subject.

### ***The Organization and Approach of This Book***

Most law school courses call on students to do more than simply digest black letter law. Although legal rules are important, a full appreciation of the subject requires an understanding of the policy behind the rules, their efficacy, and their transactional impact. *Bankruptcy and Debtor/Creditor: Examples & Explanations* is not simply an outline of legal rules. It discusses the reasons behind the rules and the impact of their operation.

This book combines expository text with examples and explanations. The textual portion provides a clear and readable exposition of the topic, beginning with the basics, and moving in the direction of more intricate and advanced issues. It focuses on material that is likely to be covered in a Bankruptcy or Debtor/Creditor course. I have tried to ensure that basic assumptions are clearly articulated, that the transactional context is clear, and that technical language is explained. (There is also a glossary at the end of the book.)

Examples and explanations follow the textual discussion. The purpose of the examples and explanations is to provide concrete illustrations of how the principles discussed in the text would apply. They are also intended to be useful to students who wish to test their knowledge and understanding of the topic. A student who tries to resolve the questions asked in the examples before reading the explanations is likely to derive the greatest benefit from this feature of the book.

# *Acknowledgments to the Second Edition*

I thank the following people for their help in connection with the second edition: Jim Huffman, Dean of the Northwestern School of Law, Lewis and Clark College, encouraged and supported my work through the Law School's Summer Research Grant Program; my research assistant, Richard Bailey, provided me with thorough and copious research; and members of the staff of Aspen Law and Business, in particular Jessica Barmack and Teresa Chimienti, were of great assistance to me both during the process of revision and at the editorial stage.

# *Acknowledgments to the First Edition*

I owe special thanks to Lenair Mulford for her word-processing wizardry, performed with uncomplaining good humor through countless drafts of the manuscript of this book. My thanks, also, to Sharon Pack for lending a hand with word processing during times of great pressure.

I am grateful to Steve Kanter, Dean of Northwestern School of law, Lewis & Clark College, for his encouragement and for his support for this project through the Law School's Summer Research Grant program, funded in part by the M. Carr Ferguson Summer Faculty Research Grant Endowment.

I thank my colleagues Ed Brunet, Susan Mandiberg, and Doug Newell for reading drafts of various chapters of this book and offering useful commentary.

Finally, I acknowledge the thorough editorial work and guidance provided by Bob Caceres, Betsy Kenny, and other members of the staff of Little, Brown and Company, and the helpful reviews of early drafts of the manuscript by several teachers of debtor/creditor law.

# *Special Notice*

To keep the text readable and uncluttered, I have been very selective in the citation of cases and have entirely omitted the citation of secondary sources, such as law review articles, treatises, and casebooks.

Sections of the Bankruptcy Code, Title 11 of the U.S.C., are simply cited by a section symbol (§) followed by the section number. Code chapters are cited by the abbreviation “Ch.” followed by the chapter number.

Many hypothetical cases are used in this book as illustrations or examples. A number of them were inspired by the facts of reported cases. The characters in the hypotheticals are imaginary. They are not intended to represent or reflect on the actual parties in any reported case referred to in this book or to resemble any other real person. Any such resemblance is purely coincidental.

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