

案例教程影印系列
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SERIES

第四版 Fourth Edition

债务人与债权人法

THE LAW OF DEBTORS AND CREDITORS

案例与难点

Text, Cases, and Problems

[美] 伊丽莎白·沃伦 (Elizabeth Warren) / 著
杰伊·劳伦斯·韦斯特布鲁克 (Jay Lawrence Westbrook)



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图书在版编目 (CIP) 数据

债务人与债权人法: 案例与难点 (案例教程影印系列) / (美) 沃伦等著. —影印本. —北京: 中信出版社, 2003.7

书名原文: The Law of Debtors and Creditors: Text, Cases, and Problems

ISBN 7-80073-827-2

I. 债… II. 沃… III. 债权法-研究-美国-英文 IV. D971.23

中国版本图书馆CIP数据核字 (2003) 第054702号

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债务人与债权人法: 案例与难点

ZHAIWUREN YU ZHAIQUANREN FA ANLI YU NANDIAN

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责任编辑: 袁婉君

出版发行: 中信出版社 (北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼 邮编 100600)

经 销 者: 中信联合发行有限公司

承 印 者: 霸州市长虹印刷厂

开 本: 787mm × 1092mm 1/16 印 张: 69.75 字 数: 1395千字

版 次: 2003年7月第1版 印 次: 2003年7月第1次印刷

京权图字: 01-2003-4240

书 号: ISBN 7-80073-827-2/D · 96

定 价: 165.00元

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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的培养。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) 覆盖了美国法学校院的主流课程，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行动能力，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。



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PREFACE

We should start the Preface to the Fourth Edition of this casebook as we did the first three: Both of us love to teach. This book is a product of the delight we have found in introducing students to a part of the law that is as filled with human drama as it is with intellectual complexity and social importance.

This preface is a little like the owner's manual that comes with a new car, albeit in abbreviated form. It tells the people who will be using this book how it works and points out some special features available in this new model. Like all owner's manuals, the preface reflects our efforts to see that everyone uses this book to best advantage. It also reflects our fervent hope that people will have as much fun using it as we had writing it.

Our primary objective is to make debtor-creditor law lively, interesting, and intellectually challenging. Our method is to use ample explanatory text to permit readers to understand the law and legal system, coupled with realistic problems to test and expand that understanding. Our principal focus is bankruptcy law, although we also discuss a good deal of nonbankruptcy law, both state and federal.

The fundamental organizing principle of *The Law of Debtors and Creditors* is the division between consumer and business bankruptcy, rather than a doctrinal organization that lumps together legal principles regardless of the factual context in which they are used. Our experience in practice and our empirical research suggest that both social policy questions and the realities of the functioning bankruptcy system are quite different in consumer and business cases. We have also found that beginners find the material more accessible when consumer bankruptcy is presented first; it becomes possible to master basic principles and see how they interrelate in a somewhat more familiar setting before tackling the twists of bankruptcy law in a complex business reorganization. In turn, the con-

sumer and business presentations are organized around the basic choice in each — liquidation or payout.

The Law of Debtors and Creditors is organized into four parts: Individual Debt Collection, Consumer Bankruptcy, Business Bankruptcy, and Functions and Boundaries of Bankruptcy Law. Each of the first three parts covers its subject in some detail for those teachers who choose to emphasize that subject. The fourth covers jurisdiction, both domestic and international, along with an introduction to the contemporary debate about the functions of bankruptcy. We do not have the luxury of devoting as much class time to each subject as we would like, so we have designed the book to permit a brief treatment of any of the subjects. Teachers can follow any of several “roadmaps” through the material, selecting a focus on state law, consumer bankruptcy, or business bankruptcy, as they choose.

While we have made every effort to ensure that the materials in the book are current and reflect the most pressing issues, the book is not a treatise designed to reveal every clever twist on a statutory provision. In making the difficult choices about how to use the space and time available, we have chosen not to include extensive citations to the majority rule, the minority rule, and the Virginia rule. Instead, we devote our space to explaining difficult concepts and central provisions of the Code as clearly and accurately as we can. We leave the details to the hornbooks and the practitioner services.

New to the Fourth Edition

The Fourth Edition has some significant changes. The state law and consumer bankruptcy sections are somewhat condensed, while the business materials are somewhat expanded, although ample coverage of state law and consumer law remains. We have added sections discussing new issues that have become sufficiently central that they deserve separate treatment in a casebook. There are new sections on Chapter 13 debtors’ efforts to cope with tax liabilities, treatment of environmental and mass tort claims in Chapter 11, and the post-reorganization effects of a confirmed reorganization. The references to UCC Article 9 have been updated to Revised Article 9 throughout the text. There are enough new problems and new cases in most sections to refresh the interest of teachers who have used the book for years, but many of the old favorites remain. Discussion of some topics has been shortened (for example, state collective remedies), while coverage of others has been expanded (for example, claims trading). In this edition, we have continued to ex-

pand our references to available empirical studies as they have emerged, while adding a bankruptcy theory section.

Even those who emphasize business bankruptcy will find that doing a portion of the consumer material first makes the business material much easier to understand. Regardless of emphasis, however, there are ample alternative assignment possibilities for those teachers who wish to focus on consumer issues and for those more interested in business problems. Teachers doing both may find it necessary to omit a portion of the problems from each part.

Features

We have structured *The Law of Debtors and Creditors* to be taught largely through its problems. The cases are primarily designed to show the operation of the statute in a relatively simple context; the students can then attack the more complex analytic and policy issues by working through the problems. While some "leading" cases are included, our case selection depends much more on the teaching value of a case than on the prominence we would give it in a law review article.

We have divided the problems into three categories: statute readers and case extension problems, which take the students through key provisions; theoretical and policy problems, which require the students to think about the social and political implications of the law; and transactional problems, which reverse the litigation orientation of most problems to make the students think about planning transactions to help clients plan and structure their affairs. The problems also force a certain amount of review and integration. As students learn more about the legal process, problem-solving increasingly becomes a function of putting pieces together and selecting the right legal tool to achieve a certain result or to analyze a policy choice.

It is our intention to make every problem "real," that is, realistic in operation and with a human face — the kind of problem a student might actually confront after graduation. The problems are designed to teach the commercial background of each subject area, as well as the legal rules. Many of the problems are practice oriented, while others put the student in the role of legislative aide, judicial clerk, or empirical researcher. In addition to practice and policy, problems raising ethical issues are woven throughout the materials, and a separate section near the end focuses on the special ethical issues raised in bankruptcy practice. These problems give a combination of perspectives. It is our intention to encourage students to appreciate issues beyond the mechanics of the statute, and

we think that the complex realities reflected through a problem approach produce more interesting insights than do neoclassical ruminations.

The “Megaproblem”

Another important feature is the inclusion of a “megaproblem,” that is, a large problem involving one debtor — Barney Thornaby — and his closely held corporation. Barney’s Problem is divided into sections and runs throughout the book. Each section reviews the material just covered and places it in a growing factual context to show how each of the doctrinal subjects relates to the others in the process of analyzing and solving Barney’s Problem. While the megaproblem can easily be omitted in favor of greater coverage, it has met with enthusiasm from teachers who have used it and from their students. The use of the megaproblem was quite unconventional in the first edition, but the approach is now appearing in a number of casebooks, reflecting its success in the classroom.

The Modern Role of Bankruptcy Law

These materials reflect our premises (or prejudices) about the modern role of bankruptcy law and bankruptcy lawyers, so we should declare those that are most important to us:

1. We believe that several factors have combined to make bankruptcy commonplace in contemporary America. One important factor has been the enormous growth in international trade competition and the creation of world markets. The consequence has been, and will continue to be, accelerating economic instability and change domestically, with one industrial or geographic sector booming while another is in sharp recession. Bankruptcy is a central part of the painful process through which families and businesses adjust to the effects of rapidly changing world markets.
2. The dramatic expansion of federal bankruptcy jurisdiction has also contributed to the increased use of bankruptcy and will continue to do so.
3. We believe that bankruptcy will be in the mainstream of commercial and business law and practice for the foreseeable future. It is therefore critical that it be understood by

every lawyer and every policymaker concerned with the functioning of our economic system.

4. On a microeconomic level, we think that debtor-creditor law has been dominated too long by easy stereotypes and untested assumptions. Calvinistic sneers at deadbeats and populist disdain for money changers reflect a distorted view of the complexities of financial relationships. Too often these emotional attachments serve as substitutes for detached analysis and careful research. One of the most important things we want to do for our students is to teach against their prejudices and, harder still, our own.

Charles Warren began his 1935 history of American bankruptcy law with the words "Bankruptcy is a gloomy and depressing subject." We reject that proposition. The economic pathology that leads to bankruptcy is indeed depressing, but bankruptcy itself is the process of healing and restoration. Bankruptcy is an integral part of a free market system that permits individuals and businesses to fail; a strong bankruptcy system undergirds a market-based economy. The bankruptcy lawyer and judge help individuals and businesses to pick up the pieces, right the wrongs, and begin anew when old approaches have failed. Bankruptcy is about the future. The bankruptcy scholar searches for a better treatment of economic wounds that is less painful and more permanent. It is good work, the work of the healer, and there is much of it to be done.

*Warren & Westbrook
Professors of Law*

Cambridge, Massachusetts
Austin, Texas
February 2001

ACKNOWLEDGMENTS

This section is the most fun to write because as we write it we know we are finished. It is also fun to write because it causes us to reflect on how much this book has been the product of wonderful students, helpful colleagues, supportive spouses, tolerant friends, and patient children. For all the help and support, we are grateful.

Some people have given extraordinary help and they deserve a special thanks. For the Fourth Edition we particularly thank Kenneth Kettering for his careful perusal of the manuscript and his many helpful comments. Keith Lundin was generous in sharing his own work about Chapter 13, giving us the chance to incorporate his insights into new sections in that part of the book. The Fourth Edition is built on the hard labor from the preceding three editions, and we gratefully acknowledge help on those editions from Dick McQueen, Ray Nimmer, and Paul Razor, who taught from early versions of the text and pointed out a frightening number of errors. We owe a debt to Alan Axelrod who read and commented on early outlines and sample chapters. Barry Cass has been a special friend, teaching our classes — and us — a great deal about the tax implications in business bankruptcy. Teresa Sullivan, our sociologist co-author on empirical research projects, has helped us develop a view of bankruptcy that looks beyond legal doctrine to difficult social and policy implementation issues. Our colleague Doug Laycock has given the best kind of support — always willing to argue a point, challenge a premise, and enjoy a new insight. We have gotten helpful comments from many colleagues around the country who have used the book. Among those especially generous with their useful criticism have been Douglass Boshkoff, Robert Lloyd, Marjorie Girth, Myron Sheinfeld, Robert Laurence, Vincent Cardi, and Charles Shafer. Margaret Mahoney gave invaluable help on various issues.

Douglas Whaley and Lynn LoPucki have been both tough and generous in their comments from the first wrinkled photocopies of

cases ten years ago to the completion of this Fourth Edition. We are grateful to them both.

We have been blessed with intelligent, dedicated research assistants. For the Fourth Edition we had the able help of Bruce Gottlieb from Harvard Law School and Derick Talerico and Ludmilla Yamalova of the University of Texas Law School. On earlier editions we had great help — from the University of Texas, Karen Cheyney, Brian Farney, Bruce James, Catherine Nicholson, Daniel Robitaille, and Kimberly Winick — and from Harvard University, Dirk Suringa and Anthony Tu. The students in our classes have remained unfailingly cheerful — even enthusiastic — about helping us with the book, and many of the successful problems and comments in the following pages stem from interesting discussions with them. One student who is now a valued colleague, Ronald Mann, provided a particularly helpful critique early on.

Our editor, Matthew Seccombe, has been nothing short of miraculous. Not everyone could dive into a book as full of complex statutory references and technically exacting problems as this one, but Matt did it with grace. He has brought a level of professionalism to his editing work that leaves us with deepest respect for a fellow professional. We have had excellent technical support from Elizabeth Guerrero and Cathy Ellis. We have also shared in the blessings of the Tarlton Law Library and its talented staff.

Finally, thanks to our friends and families who patiently listened to alternative versions of how to teach section 1111(b) elections and the merits of learning voidable preferences in a business rather than a consumer context. Polly Westbrook actually read the book and still smiled. Bruce Mann gave more loving support than anyone could ask. Joel Westbrook, Amelia Warren, and Alexander Warren tolerated all this with good grace, and asked the ultimate question: Will it sell? So far, so good.

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The problems in this book are filled with debtors, creditors, lawyers, trustees, and others who are the products of our imaginations. Any resemblance to any real person, solvent or insolvent, is purely coincidental.

We have edited cases and articles for the sake of smoother reading. Citations and footnotes have been deleted without indication. Footnotes that were not eliminated retain their original numbers; asterisks indicate editors' footnotes.

The Bankruptcy Code is referred to as "the Code," and citations to it are by section number only. "The Act" refers to the Bankruptcy Act of 1898. The latest version of Article 9 of the Uniform Commercial Code is referred to as Revised 9-[section number].

Citations to various federal consumer law acts are to the USCA and the original public law number; references are to the public law sections only because this conforms to popular usage.