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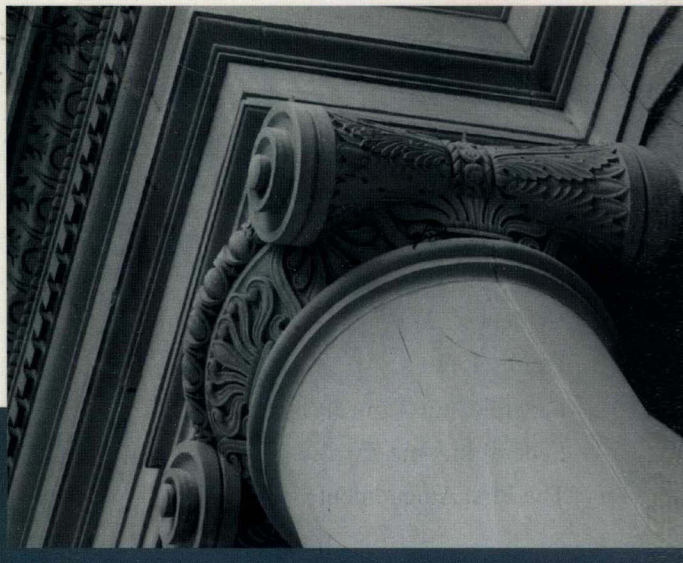
SECOND EDITION



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UNDERSTANDING BANKRUPTCY
Second Edition

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ISBN#: **978-1-4224-7440-2**

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Library of Congress Cataloging-in-Publication Data

Ferriell, Jeffrey Thomas, 1953-
Understanding bankruptcy / Jeff Ferriell, Edward J. Janger. --2nd ed.
p. cm. --(Understanding series (New York, N.Y.))
Includes index.
ISBN 1-4224-1182-6 (soft cover)
1. Bankruptcy--United States. I. Janger, Edward J. II. Title.

KF1524.F47 2007
346.7307'8--dc22
2007026154

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(Pub.00709)

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PREFACE

This book is designed to provide a basic introduction to bankruptcy and related state debtor/creditor law. It will be useful for students taking an introductory course in Creditors' Rights that emphasizes bankruptcy; a free-standing Bankruptcy course; or an advanced course in Bankruptcy Reorganization. While it does not and cannot pretend to anticipate every question that may arise, it does provide a reasonably detailed discussion of the issues most likely to arise in these courses. It is as up-to-date as possible, given the fast-changing nature of the law it examines. The 2d edition incorporates detailed discussion of the so-called "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" and refers to some of the first cases to analyze its provisions.

The primary goal of this book is to bring order and clarity to a body of law that sometimes has neither. Its focus is on the newcomer to bankruptcy, who has little or no knowledge of bankruptcy law or practice. In addition, it provides a basic explanation of much of the state commercial law and debtor-creditor law that operates in the background of a bankruptcy proceeding. It is impossible, for example, to understand many key provisions of the Bankruptcy Code without having at least some knowledge of the state law regarding mortgages, deeds of trust, and security interests.

We hope it provides a useful supplement to other primary materials: the bankruptcy code, the bankruptcy rules, and the cases decided under them. Students using this book will still need to study these more fundamental materials in detail. In many situations, they will find it useful to put this book down, pick up the Bankruptcy Code, and read the relevant statutory provision carefully. A full understanding requires facility with the Code, the Rules, and the cases.

In the last three decades, bankruptcy has evolved from a somewhat obscure specialty to one of the dominant bodies of American law. Traditionally, the bankruptcy bar was divided into two groups — the rather small group that did consumer and small business bankruptcy, and the tiny group that worked on larger business reorganizations. Each had certain elements of a club; indeed, many bankruptcy practitioners retain a degree of nostalgia for the days when insolvency lawyers, if somewhat isolated from the profession as a whole, enjoyed (in much of the country at least) the kind of (perhaps imaginary) camaraderie that is usually associated with lawyers in a small community.

Much of this has changed. Bankruptcy has become a boom area of practice, one of interest to a growing number of large firms. The annual rate of bankruptcy filings has grown rapidly, reaching a recent peak of over one-and-a-half million. The administrative and judicial structure of bankruptcy has become elaborate and formalized; the scope of bankruptcy has grown

in unexpected directions. Bankruptcy is now a serious matter not only for commercial and insolvency lawyers, but also for tax lawyers, environmental lawyers, tort lawyers, and labor lawyers, as well as those involved in business and personal injury litigation generally.

There are many reasons for this transformation. On the consumer side, some say the change is attributable to the fact that bankruptcy once carried with it the stigma of failure and dishonesty, but it does so no longer. Others attribute this shift to changes in the consumer credit industry, especially the advent of subprime lending and lenders who can lend profitably to much riskier borrowers. On the business side, some alternatives to bankruptcy, especially state insolvency proceedings, have withered away or are ineffective in the face of national and multinational business enterprises. The Bankruptcy Code itself is in part responsible; it contains a number of legal devices that permit people and companies to achieve — or at least to try to achieve — goals that are simply not achievable under any other body of law. For example, bankruptcy is practically the only method of dealing with "mass torts" in a single consolidated proceeding.

Along with the explosion of bankruptcy litigation has come a parallel explosion of academic interest in bankruptcy. Not long ago, most law schools had little more in their curriculum than a single course in Creditor's Rights, only part of which was taken up by bankruptcy law. Today, many schools have several courses, covering not only basic bankruptcy but reorganization bankruptcy, bankruptcy tax, bankruptcy environmental law, and the like. Similarly, for many years there was only one important secondary source — Collier on Bankruptcy, a venerable treatise first published in 1898 (the 15th edition of is still the leading authority).[1] Now there are many sources; of special interest to the law school community are the multiple law reviews that specialize in bankruptcy law, and the many articles on bankruptcy published in non-specialist law journals. We have tried to include a fair sampling of these other sources, to which students should turn for further discussion when they find themselves excited by a particular topic.[2]

Bankruptcy has also become a hot topic among legal theorists. Nothing that touches so large a part of the American economy and American society can exist for long without triggering efforts to fit it within larger structures of economic and political thinking. While this book is primarily aimed at giving a basic overview of bankruptcy, it also introduces the reader to the most important theoretical perspectives. Bankruptcy is an area in which

[1] Not coincidentally, Collier's is a LexisNexis publication.

[2] The suggestion that one might find bankruptcy law interesting and exciting brings to mind the teenage daughter of one of your author's friends. She found her father's amateur radio hobby both interesting and exciting, but when she passed her FCC amateur radio licensing exam, and thus became a "ham radio" operator, she made her father (W8HI) and his law professor friend (K8ZDA), promise not to tell any of her peers.

there is often little separation of theory and practice, not least because Congress is constantly returning to basic principles as it writes and rewrites bankruptcy law.

Bankruptcy law in this country is federal law. The substantive parts are found almost entirely in the Bankruptcy Code (Title 11 of the United States Code); procedural provisions are found mainly in the Federal Rules of Bankruptcy Procedure and in various parts of Title 28 of the United States Code (the "judicial code"). A few provisions are in Title 18 of the United States Code (the "criminal code"). Although some state law is directly incorporated into the Code, and other state law indirectly affects rights in bankruptcy, any conflict between state law and bankruptcy is resolved in favor of the latter.

One of the features of federal law is that a wealth of legislative history underlies it. Insofar as the Code is concerned, the primary sources of that history are the House and Senate Reports that accompanied its original enactment. There was also extensive floor debate on some provisions; and most of the subsequent amendments to the Code are supported by similar reports and debates. The weight to be given these sources is today controversial. Several members of the Supreme Court, most noticeably Justice Antonin Scalia, largely reject the use of legislative history in statutory interpretation and sometimes seems to use the bankruptcy code as a laboratory to test out his theories of statutory interpretation.

We end by suggesting one final reason why we think you will find this one of the most exciting courses you will take in law school. In a practical, if not a de jure, sense, bankruptcy is the court of last resort. In virtually every bankruptcy, there are far more claims than there are assets. Not only is there no free lunch; there is not enough lunch to feed everybody. In bankruptcy there is only so much to go around; it is not sufficient; yet it is all there is or will ever be. This means that bankruptcy law must make choices that are both unsatisfactory and final. How should the limited pool be divided up? How do we, how should we, decide between the claim of the mortgage holder to whom the debtor owes money on a loan and the maimed victim of the debtor's intentional tort? How do we also fit in the tax collector, the utility company, the credit card company, and the debtor's unpaid housekeeper? Bankruptcy law again and again forces us to make the hard, disagreeable choices that are otherwise too often ignored. You may agree or disagree with the choices that have been made, but you should understand them; you should also understand that a choice is unavoidable.

With all this said, I hope you will find your study of bankruptcy exciting and intriguing. I hope as well you will find this book a helpful guide. Good luck!

ACKNOWLEDGMENTS

Our first debt of gratitude must be to Rev. Michael J. Herbert of the Roman Catholic Diocese of Richmond, Virginia. Father Herbert provided

the authors with no direct spiritual assistance (at least that we know of), but instead with the benefit of the considerable expertise in bankruptcy and related commercial law he acquired, prior to his ordination, as a member of the University of Richmond Law School faculty, and as the sole author of the first edition of this book. Although his ecclesiastical duties made it necessary for him to refuse to be named as a third co-author of the second edition of Understanding Bankruptcy, its basic structure, format, and indeed many of its passages reflect work he did in the early 1990s. Without the benefit of his earlier work, our task would have been much harder. Any mistakes, of course, are ours alone.

Thanks are also owed to Dean Joan Wexler and the Dean's research fund at Brooklyn Law School and to Dean Jack Guttenberg and Capital University Law School's research funds. Our able research assistants Mary Daugherty and Carla Cheung, as well as Keith Moore at LexisNexis, have provided the necessary encouragement and patient editorial work.

We also owe a debt of gratitude to those who first introduced us to bankruptcy and commercial law, Profs. Gary Neustadter and former Prof. Sheridan Downey of Santa Clara University (now a successful coin dealer in Oakland, California), former University of Illinois Prof. Jonathan Landers (now at the New York office of Gibson, Dunn & Crutcher), and Professor Douglas Baird of the University of Chicago.

Finally, thanks are also owed, in connection with both this work and every aspect of our lives, to our parents, Merlin and Frances Ferriell and Inez and Allen Janger, as well to our wives, Victoria Eastus and Cheryl Hacker.

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