6-29/100.00 Bankruptcy

The bulk of bankruptcy law is found in Title 11 of the United States Code (11 USC). Bankruptcy procedures are also governed by the Federal Rules of Bankruptcy Procedure (FRBP), Official Bankruptcy Forms and local bankruptcy court rules. Bankruptcy is a complex, specialized area of civil law that impacts the sheriff when serving process, executing civil warrants or performing levies. The U.S. Constitution places bankruptcy within the jurisdiction of the federal court system. However, California law may also play a role, e.g., debtor exemptions, lien avoidance, attachment levies. While Departmental procedures are usually based on statutory and decisional law, some procedures are predicated on policy, especially when the sheriff's duties and liabilities are not clearly delineated by statute.

Bankruptcy is intended to:

- give creditors some payment on their debts if a debtor can afford to pay them and
- give debtors a fresh start by canceling many of their debts

An individual (natural person) may file a Chapter 7, 11, 12, or 13.

A partnership or corporation can only file a Chapter 7 or 11.

A municipality can only file a Chapter 9.

A stockbroker or commodity broker can only file a Chapter 7.

A railroad can only file a Chapter 11.

(11 USC 109)

Chapter 15 involves insolvency cases in foreign countries. (11 USC 1501)

• 6-29/101.00 Significant Concepts, Words and Phrases

• 6-29/102.00 341 Meeting of Creditors

A meeting of creditors (341 meeting) is required in all Chapters except Chapter 9. (11 USC 341(a), 901(a)) The United States trustee or a designee, usually the case trustee, presides at the 341 meeting. The meeting includes an examination of the debtor and, in a Chapter 7, may include the election of a trustee or creditors' committee. The debtor must appear and submit to the examination. (11 USC 343) The 341 meeting must take place not less than 20 nor more than 40 days after the order for relief.

• 6-29/103.00 Abandonment

The trustee may abandon property to the debtor that is burdensome or of inconsequential value. Unless a

hearing is requested or an objection is filed, no hearing or court order is required. (FRBP

6007(a))

The debtor, the debtor's property and property of the debtor's estate are protected by the automatic stay.

(11 USC 362(a)(5-6),(c)(1)) Property may be removed from the bankruptcy estate and vested in the debtor when: the property is claimed as exempt; the property is abandoned by the trustee; the debtor's interest expires by its own terms; or upon confirmation of a Chapter 11 or 13 (unless the court orders otherwise). (11 USC 1327(b), Epstein, Bankruptcy, 3-23(c)) Exempt or abandoned property, although no longer property of the estate, remains protected by the stay. "Property would include abandoned property. Property which has been abandoned will be property of the debtor, protected by the stay of section until the stay expires, or is terminated." (In Re Motley, 10 B.R. 141)

• 6-29/104.00 Abstention

The court may abstain and decline jurisdiction if the interests of justice are best served by allowing another court to hear the matter.

• 6-29/105.00 Adversary Proceeding

Issues in bankruptcy may be adjudicated as an adversary proceeding or as a contested matter. Adversary proceedings are initiated by a complaint and resemble civil cases in the district court. (FRBP 7001)

The following are adversary proceedings:

1. a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
2. a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);
3. a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
4. a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), (a)(9), or 1328(f);
5. a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
6. a proceeding to determine the dischargeability of a debt;
7. a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
8. a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
9. a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
10. a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

An adversary proceeding is commenced by filing a complaint in the bankruptcy court. The clerk issues a summons directing the defendant to file a timely response to the complaint. (FRBP 7004(a); FRCP 4(b)) The summons and complaint must be served within 10 days of the issuance of the summons. If service is not effected timely, a new summons must be issued and served. (FRBP 7004(e)) The summons and complaint may be served anywhere in the United States by mail, personal delivery, residence service or publication. (FRBP 7004(b),(d), (c); FRCP 4(e)-(j)) Service by mail is complete upon mailing and not upon delivery. (FRBP 9006(e)) The defendant must serve an answer to the complaint or make a motion within 30 days after the issuance of the summons. (FRBP 7012(a)) The United States has 35 days to serve an answer or make a motion. (FRBP 7012(a))

An adversary proceeding may be adjudicated even if the bankruptcy has been closed. Correspondingly, an adversary proceeding may be reopened without reopening the bankruptcy case. A case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." (11 USC 350(b)) Thus, if the litigation in the adversary proceeding does not involve the trustee or estate assets, the case does not have to be reopened.

An adversary proceeding is assigned a separate case number which is used in conjunction with the bankruptcy case number.

• 6-29/106.00 Contested Matter

Contested matters are initiated by motion. The term "contested matter" includes any litigation in a bankruptcy case involving an actual dispute, other than an adversary proceeding. A contested matter is initiated by a motion, rather than by complaint. (FRBP 9014, 7001) A motion may be uncontested and is served in the same manner as a summons and complaint. (FRBP 7004) A timely filed objection opposing the relief or action sought creates a contested matter. A response is not required in a contested matter unless ordered by the court. Local bankruptcy court rules govern the opposing party's rights to a hearing. (FRBP 9014)

Contested matters include:

1. consolidation (FRBP 7042)
2. conversion
3. dismissal (FRBP 7041)
4. execution of a judgment (FRBP 7069)
5. findings (FRBP 7052)
6. judgments (FRBP 7054-7056)
7. objection to confirmation
8. relief from stay
9. seizure of persons or property (FRBP 7064)
10. stay of enforcement of judgment (FRBP 7062)

A judgment entered in a contested matter must be set forth on a separate document to eliminate uncertainty as to whether an opinion or memorandum of the court is a judgment. (FRBP 9021) There is no particular form for a judgment.

• 6-29/107.00 Writ of Attachment

Unlike other levies, the disposition of a levy under a writ of attachment made within 90 days prior to the filing of a petition in bankruptcy is clearly set forth in the Code of Civil Procedure. (CCP 493.030, 493.040, 488.730)

• 6-29/108.00 Automatic Stay

The automatic stay affords the debtor a breathing spell from creditors by stopping all collection efforts, harassment and foreclosure actions. It permits the debtor to devise a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove the debtor into bankruptcy. However, the filing of the petition does not necessarily terminate a levy.

• • 6-29/108.10 Commencement of Automatic Stay

At the time of filing of a petition in bankruptcy, an automatic stay is created and is applicable to all entities, of (11 USC 362(a); In Re Kleitz 6 BR 214):

1. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
2. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
3. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
4. any act to create, perfect, or enforce any lien against property of the estate;
5. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
6. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
7. the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
8. the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

• • 6-29/108.20 Termination of Automatic Stay

The automatic stay ends as to the debtor when the bankruptcy is closed or dismissed or a discharge is granted or denied. However, it continues as to property of the estate until the case is closed or dismissed or

the trustee abandons the property.

Once the automatic stay is terminated, it may not be reinstated in that case except by court order. However, the court may issue a stay under 11 USC 105 or some other code provision. If the debtor files a new case, a new automatic stay begins unless there is an order to the contrary. Upon conversion from Chapter 11 to Chapter 7, a stay is not reimposed so as to make one who obtained relief apply again. (Cowans, Bankruptcy Law and Practice, 11.3(f)) "Nowhere in section 362 is any provision made for reimposing the automatic stay once it has been terminated." (In Re Campos, 128 BR 790)

Except as it may be terminated, annulled, or modified by the bankruptcy court, the stay of any act against property of the estate continues until such property is no longer property of the estate, and the stay of any other act continues until the earliest of the time the (11 USC 362(c)):

- case is closed;
- case is dismissed; or,
- discharge is granted or denied if the case is under Chapter 7 concerning an individual or a case under Chapter 9, 11, 12, or 13.

The automatic stay ends in all respects when the bankruptcy is closed or dismissed or a discharge is granted or denied.

• • 6-29/108.30 Personal Property Lease

The automatic stay is terminated on leased personal property and the property is no longer property of the estate if the leased property is not assumed by the trustee. An individual Chapter 7, 11, or 13 debtor may assume a personal property lease. 11 USC 362(h), 521(a)(2))

• • 6-29/108.40 Repeat Filings

• • • 6-29/108.41 Prior Case Filed Within One Year

The automatic stay terminates 30 days after a new case is filed within one (1) year after an earlier dismissed case. However, the court may, after notice and hearing, extend the stay upon showing that the new case is filed in good faith. (11 USC 362(c)(3))

• • • 6-29/108.42 Two or More Prior Dismissed Cases

There is no automatic stay if a debtor files a case after two or more cases were dismissed in the previous year. However, the court may order, after notice and a hearing, that the stay take effect upon a showing that the new case is filed in good faith. (11 USC 362(c)(4))

There is a presumption that the new case is filed in bad faith if:

- the debtor filed more than one prior case in the preceding year, or
- a prior case was dismissed for failure to file documents without substantial excuse, failure to provide adequate protection, or failure to perform the terms of a confirmed plan, or
- there has been no substantial change of circumstances since the last dismissal that would make the new case likely to be successfully concluded, or
- a prior case was dismissed after a creditor had filed a motion for relief from the automatic stay.

• • 6-29/108.50 Notice of Bankruptcy

The automatic stay is effective upon the filing of the petition in bankruptcy whether or not the levying officer has knowledge of the bankruptcy. However, the levying officer must have notice or knowledge of the bankruptcy in order to comply with bankruptcy policies and procedures. "Notice" should be verifiable and may be in a variety of forms, such as a copy of a document issued by the bankruptcy court, a letter signed by the bankrupt or his attorney, information in an employer's return or garnishee's memorandum of garnishee, or verifiable oral notice. At a minimum, reasonable "notice" includes the name or location of the bankruptcy court, the approximate date of filing and the name and address under which the debtor filed the petition.

• • 6-29/108.60 Actions by Debtor

The automatic stay applies to actions against the debtor, not to actions brought by the debtor. For example, the stay does not apply to a debtor's counterclaim. The stay "does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate." (Shorr v Kind, 1 CA 4 249; In re Regal Const. Co., Inc., 28 BR 413) A claim of exemption or third party claim filed by the debtor should be processed as usual.

• • 6-29/108.70 Exceptions to Automatic Stay

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 created additional exceptions to the automatic stay for: the commencement or continuation of proceedings for child custody, domestic violence, and divorce; withholding of income to pay a domestic support obligation pursuant to a judicial or administrative order or a statute; interception of tax refunds for domestic support obligations; withholding of licenses from debtors who do not pay support obligations; reporting of credit reporting agencies of debtors who do not pay support; interception of tax refunds to collect support; and enforcement of medical support obligations. (11 USC 362(b))

• • • 6-29/108.71 Nonresidential Property Eviction

The filing of a petition in bankruptcy does not stay an action by a landlord to recover possession of nonresidential property from a tenant under a lease which has expired under its stated term, whether the term expired prior to or after the tenant's filing of a petition in bankruptcy. A relief order from automatic stay is not required. 11 USC 362(b)(10) The levying officer may proceed with the eviction upon receipt of signed instructions from the judgment creditor stating; "The real property described in the writ of possession is

nonresidential property under a lease which has, under the stated term, expired and, pursuant to 11 USC 362(b)(10), is an exception to the automatic stay."

• • • 6-29/108.72 Residential Property Eviction

An eviction proceeding to evict a debtor who is a residential tenant is excepted from the automatic stay and may continue if the lessor (landlord) has obtained a judgment prior to the filing of the petition. However, the automatic stay will apply for 30 days after the petition if (1) the debtor certifies in the petition a right to cure a default and (2) the debtor deposits with the bankruptcy court any rent that would become due during the 30 days after the filing of the petition. The automatic stay may be extended if the debtor files a further certification within 30 days after the petition that the debtor has cured the default and the court finds the landlord's certification to be untrue. (11 USC 362(b)(22))

• • • 6-29/108.73 Residential Property Eviction (Endangerment/Drug Activity)

Eviction proceedings to evict residential tenants may continue if the lessor (landlord) seeks possession based on endangerment of property or illegal use of controlled substances at the property. An exception to the automatic stay begins 10 days after the lessor files a certification with the court alleging endangerment or use of substances occurred within 30 days before the certification. The debtor must object to the certification within 15 days of the certification, in which case the court shall determine whether grounds for the exception exist. (11 USC 362(a)(3))

• • • 6-29/108.74 Post-Petition Earnings

The collection of alimony, maintenance, or support from earnings or services performed by an individual debtor after the filing of the petition in bankruptcy is not stayed unless the debtor filed a Chapter 13. (11 USC 541(a)(6), FRBP 1306(a)(2)) In a Chapter 13, all wage garnishments, including those for alimony or support, are stayed and claims must be filed with the Chapter 13 trustee. Property of the estate in a Chapter 13 case is broader than that in Chapter 7 and includes earnings for personal services performed by the debtor and all property of the kind specified in 11 USC 541 acquired after the commencement of the case, but before the case is closed, dismissed, or converted to a case under another chapter.

• • • 6-29/108.75 Bench Warrant (Civil)

A civil bench warrant for the debtor's arrest following the failure of the debtor to appear at a judgment debtor examination may or may not be stayed, depending on whether the court is exercising its police power (contempt of court). Bankruptcy stays the debtor examination but 11 USC 362(b)(4) excludes from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers." Case law generally recognizes the court's contempt power to uphold the dignity of the court as an exception to the automatic stay. Consequently, the debtor may be arrested for contempt, but not subjected to a debtor examination.

• • • 6-29/108.76 Domestic Actions

The automatic stay does not apply to civil or criminal actions concerning (11 USC 362(b)(2)):

- for the establishment of paternity
- for the establishment or modification of an order for domestic support obligations
- concerning child custody or visitation
- for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate
- regarding domestic violence

• • • 6-29/108.80 In Rem Order for Relief from Stay

The court may issue an in rem order for an interest in real property if the petition was filed to delay, hinder, and defraud creditors attempting to transfer ownership. The in rem order must be recorded in compliance with state recording statutes to be binding on any bankruptcy concerning that property filed within two years after the in rem order is entered. A debtor may obtain relief from the in rem order upon a showing of changed circumstances or good cause. (11 USC 362(d)(4))

• • • 6-29/108.90 Ineligibility for File Bankruptcy

An individual or farmer debtor cannot file bankruptcy if (11 USC 109(g)):

- the debtor filed a prior bankruptcy case within 180 days that dismissed for failure to abide the orders of the court, or
- the debtor dismissed the prior bankruptcy following a creditor's request for relief from the automatic stay

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• 6-29/109.00 Violation of Automatic Stay

Actions taken in violation of the automatic stay are void and without effect and a violator may be held in contempt of court. (In Re Schwartz, 954 F 2nd 569; Cowan's Law and Bankruptcy Practice, 11.3(n)) The debtor may also recover actual and punitive damages against a party willfully violating the automatic stay. (11 USC 362(h)) However, the court may grant "retroactive relief from the automatic stay in order to validate violations of the stay that would otherwise be considered void." (In Re Jewett, 146 BR 250)
