

**NORTHEASTERN UNIVERSITY SCHOOL OF LAW
COURSE SYLLABUS -- CONSUMER BANKRUPTCY**

FALL QUARTER 2010

Professor Daniel A. Austin
Class meets: M, W 8:30 a.m. - 10:00 a.m.
Office hours: M, W 10:00 a.m. - 12:00 p.m.
Additional hours as necessary.

Office: Cargill 54a
Tel: 617.373.3668
Email:d.austin@neu.edu

OVERVIEW OF THE COURSE:

Personal bankruptcy is notable feature of contemporary American life. There were approximately 1.4 million consumer bankruptcy filings in 2009, with the rate holding steady for 2010. By some estimates, up to 10 percent of American households have filed for personal bankruptcy at some time.

There are many reasons why people find themselves in financial distress, and we will consider some of these causes during the course. Whatever the cause, consumer bankruptcy practice is an area of law in which a newly-minted lawyer can begin representing clients immediately upon admittance to the bar. The purpose of this course is to prepare you to represent debtors and creditors in consumer bankruptcy cases.

United States bankruptcy law is governed by the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, and by the Federal Rules of Bankruptcy Procedure. In addition, certain substantive matters (such as the scope of property rights) are based upon state law. Bankruptcy concepts are cumulative and relate to each other in a systematic way. We will apply these concepts throughout the course through problem-solving and advocating the interests of debtors and creditors.

As part of the course, you will represent a hypothetical client in a consumer bankruptcy case, including analysis of the client's financial situation, draft a petition and schedules, respond to objections, if any, and represent the client at an in-class meeting of creditors conducted by a bankruptcy trustee.

EVALUATION

A lawyer's stock-in-trade is words. Accordingly, class participation is essential and counts for 25 percent of your grade. The first sentence of your written evaluation for the course will be an accurate summary of your class participation. Another 25 percent of your grade will be based upon your representation of hypothetical bankruptcy clients. The remaining 50 percent will be based upon an open book, open-note final exam.

TEXT

The text for the course is William D. Warren and Daniel J. Bussel, *Bankruptcy* (Foundation Press, Eighth Ed., 2009), and the 2010 Supplement. In addition, you will need your own copy of the Bankruptcy Code and the Federal Bankruptcy Rules. I have ordered West Academic Bankruptcy Code, Rules and Forms (West 2010). However, any recent edition of the Bankruptcy Code and Rules should work as well.

I will post the additional readings on my TWEN site or hand them out in class.

READINGS AND CLASS DISCUSSION

Readings and topics for class discussion are set forth below. The readings refer to the text, except where other sources are listed. You must also read the Supplement pages that correspond with the text. Some readings will require more than one class period to cover, and some may take less than a full period.

The text contains material on both consumer and business bankruptcy. We will skip sections of the text dealing with business bankruptcy.

I. INTRODUCTION TO BANKRUPTCY

Chapter 1 covers the basic terms, purposes, and procedure of bankruptcy.

A. Liens and security interests

Read pp. 1-18 regarding three types of liens. How do creditors obtain liens, and what role do liens play in the debt collection process?

B. Overview of bankruptcy

Read pp. 18-28. This section introduces the types of bankruptcy, eligibility for bankruptcy, and the bankruptcy process. If only it was this easy.

Bankruptcy Code §§ 101(9), 101(13), 101(15), 101(41), 341, 701, 704(a).

Bankruptcy Rules 1007, 2003.

Const. Art. I, §8, cl.4.

II. THE BANKRUPTCY ESTATE

The purpose of Chapter 2 is to understand the scope of the debtor's property that is subject to control and administration by the bankruptcy trustee.

A. Property of the estate

Read pp. 29-36 regarding the definition and scope of the concept of “property of the estate.” All property of the estate must be listed on the Debtor’s schedules A and B.

Skip pp. 36-40, starting with “Turnover.”

Bankruptcy Code §§ 521(a)(1)(B)(i), 541(a)(1) – (7)
Bankruptcy Rule 1007

B. Exemptions

This section deals with debtor’s exemptions, and avoiding judicial liens that impair an exemption. What is the purpose of exemptions?

Read pp. 40-49 on exempt property and impairment of exemptions.

Skim *In re Silveira* on pp. 49-54.

Read Note. 2 on pp. 54-55.

Skip “Fixing of lien” on p. 55, but read the Problem on p. 56.

Bankruptcy Code §§ 522(b)(1), 522 (b)(3)(C), 522 (d), 522(f)(1)(A), 522(f)(1)(B), 522(f)(4)(A)
Bankruptcy Rule 4003

C. Pre-bankruptcy planning

Will someone tell me why a debtor should be denied a discharge for doing something that was completely legal when it was done?

Read pp. 56-76 on “prebankruptcy planning” and “asset protection.” Consider how to reconcile *Norwest Bank Nebraska v. Tveten* with *Hansen v. First National Bank in Brookings*.

Bankruptcy Code §§ 522(b)(3)(A) - (B), 522(p)(1), 522(o)

III. CLAIMS

Chapter 3 deals with claims by creditors against the bankruptcy estate. You remember creditors---they’re the ones who are owed money.

A. Proofs of claim and getting paid as a creditor in a bankruptcy estate

Read pp. 77-79.

Don’t read “Cases under Chapter 11,” on pp. 79-80.

Read “Right to Payment,” p. 80.
Skip *In re Piper* and pp. 80-104.
Read Note 2 on pp. 103 dealing with claims for money damages based upon a non-compete agreement.
Read pp. 104-106 on determining the amount of a claim.

28 U.S.C. §§ 157(b)(2)(B), 157(b)(5), 1411
Bankruptcy Code §§ 101(5), 502, 523(a)(3)
Bankruptcy Rule 2002(e), 3001, 3002, 3003(c)(3)

B. Secured claims and priority claims

Read pp. 106-109 on secured claims. You may read pp. 109-117 for more on valuing secured claims if you want, but we will cover this later in the section on “cram down” in chapter 13.
Don’t read pp. 117-121 on avoiding liens at this time.
Read pp. 120-121 regarding post-petition secured claims.
Read pp. 121-123 regarding priority claims.
Don’t read *In re Jartran*, and skip pp. 123-127.

Bankruptcy Code §§ 507(a), 726(a)

IV. STATEMENT OF INTENTION, REAFFIRMATION, AND
BIFURCATION OF CLAIMS

This section deals generally with the treatment of secured claims in chapter 7. Note that secured claims are treated differently in chapter 13.

A. Debtor’s Statement of Intention and reaffirmation

Read pp. 1-14 (Basics of Reaffirmation) and pp. 27-31 (“Ride-Through”) in Daniel A. Austin and Donald R. Lassman, *Reaffirmation Agreements in Consumer Bankruptcy Cases* (American Bankruptcy Institute, 2009).
Read pp. 544-548.
Read pp. 116-117 on “redemption” and replacement value.

Form 240A, Reaffirmation Agreement
Bankruptcy Code §§ 521(a)(2), 722
Form B8

B. Bifurcation of secured claims under §506

Read pp. 117-120.
In chapter 7, a debtor may not avoid a completely unsecured lien (such as an underwater junior mortgage). However, a debtor in chapter 13 may strip

off a totally unsecured lien. After reading *Dewsnup*, what is the logic for this? Recall that under §522(f)(1)(B), a debtor may avoid a non-purchase money security interest in personal property.

Bankruptcy Code §§ 506(a), 506(d).

V. DISCHARGE

The objective of most persons filing a chapter 7 bankruptcy is a “fresh start” discharge of debt. However, some debts may not be discharged, and in some circumstances, a debtor may be denied a discharge entirely.

A. Denial due to debtor’s misconduct

Read pp. 129-132

Bankruptcy Code §§ 727(a)
Bankruptcy Rule 7001(4)

B. Nondischargeable debts.

Read 132-138. Read *In re Madaj*, but don’t read *In re Werthen*.

Read pp. 143-145, and the Notes and Problems on non-dischargeable marital debt obligation on p.144. Consider whether an inflexible approach to discharge of marital debt can lead to inequitable results.

Read the section on “Willful and Malicious Injury” on p.145, but don’t read *Kawaauhau v. Geiger* or pp. 145-150.

Read pp. 151-155 on education loans. Note the discussion of the *Espinoza* case in the Supplement.

Read pp. 155-156 on fraudulently incurred debt.

Read pp. 158-163 on credit card debt, including *American Express Travel Related Services Company, Inc. v. Hashemi*, and the notes following the case. How do you explain the different outcomes for *Hashemi* and *In re Ellsworth*?

Read pp. 163-171 regarding fines, taxes, and protection of the debtor after discharge. Review the problems on pp. 171 carefully.

Skip pp. 172-178, but be aware of §525(a) and (b) regarding protection against discriminatory treatment of debtors.

Bankruptcy Code §§ 523(a)(2)(A)-(B), (5), (8), (15); 525(a)-(b), 727, 1328(a)
Bankruptcy Rule 7001(6)

VI. STAYS AND INJUNCTIONS

Chapter 5 of the text deals with the automatic stay and injunctions against proceedings against property of the debtor's estate.

A. General applicability of the automatic stay

Read carefully pp. 179-187.

Do not read *In re Soares* on pp. 187-196.

Bankruptcy Code §§ 105, 362(a), 362(b), 362(c)(3) and (4), 362(k).

B. Secured claims

Read pp. 197-198 regarding secured claims, but do not read *Johnson v. First National Bank*. Does the stay apply to co-debtors or guarantors of the debt?

Skip pp. 198-323.

VII. TRUSTEE'S AVOIDANCE POWERS

The Bankruptcy Code provides the trustee with broad powers to avoid (nullify and reverse) certain pre-bankruptcy transfers of estate property. This is done in order to prevent favored creditors from unfairly receiving a greater portion of the distribution of the debtor's assets than other creditors.

A. Preferences

Read pp. 323-326 regarding preferences. Review p. 325 Problem 1(a) and Problem 2, but not Problem 1(b).

Skip the discussion on "earmarking" on pp. 326-328

Read p. 354 regarding preferences in exempt property.

Skip pp. 328 to 362.

Bankruptcy Code §§ 101(32), 101(54), 547(b), 547(f), 550(a), 551

B. Setoff

Read the material on setoff on pp. 362-368. Prepare Problem 1 on page 367, and Problem 2 on p. 367-368. Review *Citizens Bank of Md. v. Strumpf*.

Do not read the rest of p.368 on "Improvement in Position."

Bankruptcy Code §§ 553(a), 553(b)(1)

C. Fraudulent transfers

Read pp. 368-377. Help me understand why charitable contributions made while insolvent are not fraudulent transfers.
Skip the rest of p. 377-421.

Uniform Fraudulent Transfer Act §§ 4(a)(2), 7(a)(1)
Bankruptcy Code §§ 544(b)(1), 548(a)(1)(B), 548(a)(2)

D. Trustee's strong powers

Read pp. 421-427 on the trustee's strong arm powers.
Skip the rest of pp. 427-430.

Bankruptcy Code §544(a)

VIII. CONSUMER DEBTOR IN CHAPTER 7 AND 13

Chapter 9 of the text focuses on representing debtors in consumer chapter 7 and chapter 13 bankruptcy. You will receive the information on your hypothetical client at this point. I suggest you start working on your case now in order to resolve any problems in your case. Please note the deadlines and meeting dates listed below.

Your first task will be to determine whether your debtor should file for chapter 7 or chapter 13. You must also determine if any other pleadings should be filed, such as a motion to avoid judicial liens, etc. You will then represent your client at an in-class Section 341 meeting of creditors. All petitions and schedules must be completed using Best Case or some other bankruptcy software application.

A. Chapter 7: Presumption of abuse and "means testing"

Read and be prepared to discuss *Marrama v. Citizens Bank of Maryland*, 549 U.S. 365 (2007). This is an important case for interpretation of the Bankruptcy Code and the qualifications of debtors.

Read pp. 465-492. The primary focus of these readings is to understand "presumption of abuse" and means testing for chapter 7 debtors. This is performed using Form 22A. (Note that chapter 13 debtors use a somewhat similar Form 22C to determine disposable income.) Consider the effective difference between lease or rent payments and payments of secured debt.

Read *Morse v. Rudler (In re Rudler)*, No. 08-9007 (1st Cir., August 5, 2009). This case deals with whether the debtor may deduct payments for secured debt where the debtor intends to surrender the collateral. What is the logic of the court's decision?

Bankruptcy Code §§ 101(10A), 707(b)(1), 707(b)(2), 707(b)(3)
Form 22A

B. Duties of the Debtor, Attorneys, and U.S. Trustee

Read pp. 493-508.

Be sure to read the entire *Milavetz* case on pp. 21-36 of the Supplement. Regarding *Milavetz*, why would an attorney advise a client to incur debt shortly before filing for bankruptcy?

Read the various disclosure requirements in §§ 527 and 528. How much of the required disclosures do you think debtors will understand?

Read *Schwab v. Reilly* on my TWEN site. What is the best practice for listing an asset and claiming an exemption on Schedule C?

Bankruptcy Code §§ 109(h), 111(c)(2)(A) and (E), 526(a)(4), 528(a)(4), 528(b)(2), 707(b)(4), 727(a)(11), 1328(g).
Rule 2016

C. Chapter 13: Debtor qualifications, plan of reorganization, and “disposable income” test

These readings deal with chapter 13 debtor qualifications, the “disposable income test,” and the plan of reorganization and plan confirmation. Pay particular attention to §§ 1322 and 1325. The material regarding Form B22C and the “disposable income test” is a key element of consumer bankruptcy law.

Read pp. 508-533.

Note that pp. 528 – 530 are replaced by *Hamilton v. Lanning* in the Supplement at pp. 37-49.

Bankruptcy Code §§ 109(e), 521(a)(1), 1322, 1325, 1326, 1327, 1328
Bankruptcy Rule 3015(b)
Form 22C

D. Post-confirmation modification of the plan, payments outside the plan, and discharge

OK, the plan was confirmed, but sometimes, between confirmation and discharge, it may be necessary to modify the plan or to make payments outside the plan.

Read pp. 533-543, but skip *In re Crawford*.

Bankruptcy Code §§ 586(e)(2), 1322(a)(5), 1322(b)(5), 1326(c), 1329(a)

E. Chapter 13: lien stripping and cramdown

Read pp. 547-561. Read very carefully pp. 549-557 and §§ 1322(b)(2) and 1325(a)(5) so that you understand how secured claims are treated in a chapter 13 plan. Note the “hanging paragraph” limitation on lien stripping for vehicles purchased for personal use within 910 days of the petition date. Consider whether surrender of secured collateral terminates the debtor’s personal liability for the unsecured deficiency. The *Capital One* case discussed on pp. 556-557 is instructive. Read pp. 561-574 on secured claims in the debtor’s residence. You can skim *Nobleman v. American Savings*, but be aware of the holding of the case.

Bankruptcy Code §§ 1322(b)(2), 1322(b)(5), 1325(a)(5) “hanging paragraph” following 1325(a)(9)

F. Chapter 341 Meeting of creditors

Materials on Chapter 7 and Chapter 13 meetings of creditors to be provided.

Bankruptcy Code §§341, 1324
Bankruptcy Rules 2002 and 2003

G. Contested matters, and adversary proceedings

Materials to be provided.

This section covers contested matters under Bankruptcy Rule 9014, such as a motion for relief from stay and a motion to determine value of a lien, and adversary proceedings under Rule 7001, such as complaint to avoid a lien, and an objection to dischargeability of debt.

Bankruptcy Code §§ 362(d), 532(c).
Bankruptcy Rules 2004, 4001(a), 4004, 4007, 7001, 8004, 9006, 9011, 9014.

IX. BANKRUPTCY COURTS

A. Bankruptcy Court Jurisdiction

Read pp. 823-841. The complicated jurisdictional issues of the bankruptcy court are a result of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* Jurisdictional issues include original

jurisdiction, exclusive and non-exclusive jurisdiction, and “core,” “non-core,” and “related-to” jurisdiction. Read *In re Toledo*, but don’t focus on the facts. Make sure you understand the *Pacor* test for “related-to” jurisdiction on p. 831, and the *Wood* test for “core” jurisdiction on p. 835.

Read “Withdrawal of the Reference” on p. 841, but then skip to p. 862.

For additional information, read Daniel A. Austin, “The Bankruptcy Clause and the Eleventh Amendment: An Uncertain Boundary Between Federalism and State Sovereignty.” 42 University of San Francisco Law Review pp. 383 – 426 (Fall 2007). The article provides an overview of the history of bankruptcy law in the United States, and introduces federal bankruptcy law within the framework of American federalism. What is left of state sovereign immunity after *Central Virginia Community College v. Katz*?

28 U.S.C. §§ 157(a), (b), (c), 1334. 1408 (1) (venue for non-business debtor).

B. Appellate Jurisdiction

Read pp. 862, starting with “Proceedings in the case,” and then continue to p. 868. Most of this section deals with appeals.

X. IN-CLASS SECTION 341 MEETINGS

Section 341 meetings of creditors will be held on November 8 for chapter 13 debtors, and on November 10 for chapter 7 debtors. You must attend both classes even if your case is not scheduled for that date.

DEADLINES:

For both chapter 7 and 13 debtors: The petition, schedules, and pleadings, if any, are to be filed on or before Thursday, November 4 at 12:00 noon.

NOTICE TO COUNSEL: Filing is completed by delivering two (2) hard copies of all documents to my office by the filing deadline. Because the written materials must be reviewed by the trustee prior to the meeting of creditors, there will be no extension of the filing deadlines. Failure to timely file all documents will result in dismissal of your case, and no points for this part of the course. Furthermore, the client will want a full refund of his or her retainer. I hope you did not spend it already.