

ADVISING CLIENTS ON NAVIGATING THE
BANKRUPTCY FLOOD OF 2010
September 7, 2010

- I. Introduction — Title II, United States Code
 - A. History
 - 1. Effective Date of Bankruptcy Reform Act of 1978:
October, 1979
 - 2. Former Act had been in force since 1798
 - 3. Several Amendments including 2005 BAPCPA
 - B. Number of Bankruptcy Filings has greatly increased.
 - 1. Bankruptcy Code
 - 2. Effects of Recession
 - 3. Attorney Advertising
 - C. Types of Bankruptcies: Chapter 7, 11, 12, and 13
 - 1. Chapter 7: Liquidating bankruptcy with or without assets. All assets are sold and proceeds of sale are distributed to creditors,
 - 2. Chapter 11: Business reorganization provisions. Allows business entity to continue operating under supervision of trustee and court; debtors propose a written simplified plan which creditors vote on for payment of outstanding debts over an indefinite period of time.
 - 3. Chapter 12: Allows family, farmer or fisherman with regular annual income to continue operating under supervision of the trustee and the court and propose a simplified written plan. Creditors vote upon the plan for payment of outstanding debts over an indefinite period of time.
 - 4. Chapter 13: Individual reorganizations. Basically

the same as Chapter 11 only for individuals with limited debt structure. Debtors propose a written plan for payment of creditors is submitted and voted on. Minimum length of plan 36 months, maximum length 60 months.

D. Purposes of Bankruptcy

1. Give the debtor a fresh start.
2. Distribute available assets equitably among creditors.
3. Provide full disclosure of necessary and relevant information to creditors.

E. Trustee's Avoidance Powers

1. Statutory liens.
2. Preferences.
 - a. Trustee may avoid any transfer of property of the debtor:
 - (1) To or for benefit of creditor.
 - (2) For or on account of antecedent debt.
 - (3) Made while debtor was insolvent.
 - (4) Within 90 days of date petition is filed.
 - (5) Creditor thereby receives more than would have received under Chapter 7 if transfer not made
 - b. If creditor is insider and had reasonable cause to believe debtor insolvent: trustee avoids transfers up to one year.
 - c. Rationale: stop creditor actions shortly prior to bankruptcy as debtor is in trouble: treat all creditors equally or as they contracted to be treated.

3. Fraudulent Transfers.

a. Trustee avoids any such transfer made within two to four years prior to filing.

- State Law UFTC -
- Federal Law 11 U.S.C. § 548 of the Bankruptcy Code
- Transfers made within four years of claim; two years of filing under Code.

Uniform Fraudulent Transfer Act and § 548

Transfers made within four years of claim; two years of filing under Code.

(a) Actual intent to hinder, delay or defraud creditor

(b) Constructively fraudulent transfer made without receiving a reasonably equivalent value in exchange for the transfer.

(i) The remaining assets of the debtor are unreasonably small in relation to the business or transaction

(ii) Debtor intended to incur debts beyond the ability to pay the debts as they become due

b. Rationale: Stop unfair transfers to parties to provide fair distribution to all creditors

F. Creditor Analysis and Overview of Chapter 11 Case.

1. Factors to consider.

(a) Quality of management of debtors business.

(b) Debtor unable to meet plan payments due to financial difficulty already?

(c) Viable business potential?

(d) Sum of component parts more valuable than business entity?