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I. Overview of Creditor's Rights

A. Overview of Chapters 7, 11, and 13

Chapter 7 – Liquidation. In a Chapter 7, the debtor may seek relief from all of its debts (that are subject to discharge) via a liquidation of the debtor’s property. A trustee has the responsibility of administering the estate and liquidating the proceeds as set forth in the bankruptcy code. While an individual or a business entity may seek relief under Chapter 7, only an individual may be granted a discharge under this chapter.

Chapter 13 – Individual with Regular Income. Chapter 13 is for debtors with regular income. 11 U.S.C. § 109(e). In a Chapter 13, the debtor proposes plan to repay its creditors in full or in part, in installments over a three to five year timeframe. The code specifies what the plan must include. The highlights of a confirmable Chapter 11 plan are: (A) secured creditors must be paid an amount equal to the value of the collateral securing the debt; and (B) unsecured creditors must be paid a pro-rata share to the extent of (1) non-exempt equity in property or (2) the debtor’s disposable income. 11 U.S.C. § 1325.

Chapter 11 – Reorganization. Chapter 11 is by far the most complicated of these three chapters. Generally a Chapter 11 consists of a business reorganization. However, Chapter 11 is not only for reorganizations, as a debtor can propose a liquidation plan. Further, it is not limited to business entities—an individual may file a Chapter 11. Under a Chapter 11, the trustee acts only in a limited role. The debtor acts as “debtor in possession” and assumes many of the roles that would otherwise be attributable to the trustee in a Chapter 7. The debtor in possession has a fiduciary duty to the unsecured creditors, and its duties include, but are not limited to: accounting for all property received, examination and objections to proofs of claim; and furnishing
information concerning the estate and the administration of the estate. The debtor will eventually propose a plan to repay its creditors in full or in part. As with a Chapter 13, the code specifies the requirements of a confirmable plan. A full list available at 11 U.S.C. section 1129.

B. General Bankruptcy Issues for All Chapters

Petition / Automatic Stay. To commence a case under any chapter a debtor will file a bankruptcy petition. The automatic stay is available only to the debtor in Chapters 7 and 11, and also any codebtors in Chapter 13. The filing of the petition automatically stays certain acts to collect a debt against the debtor or the debtor’s property. Specifically, the following acts are stayed by 11 U.S.C. § 362:

(1) The commencement or continuation, including the issuance or employment of a 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 [title 11], or to recover a claim against the debtor that arose before the commencement of the case under [title 11];

(2) The enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under [title 11];

(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 [title 11];
(6) Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under [title 11];

(7) The setoff of any debt owing to the debtor that arose before the commencement of the case under [title 11] against any claim against the debtor; and

(8) The commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor’s tax liability 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 [title 11].

11 U.S.C. section 362 also contains exceptions to the automatic stay. Sometimes, what is considered to be subject to the automatic stay is not intuitive. For example, courts consider claims against an alter ego to pierce the corporate veil to be claims of the bankrupt debtor, and, therefore, subject to the automatic stay. Ballie Lumber Co. v. Thompson, 413 F.3d 1293 (11th Cir. 2005). A similar reasoning has led some courts to hold that claims for fraudulent transfers against transferees to the automatic stay. In re Zwirn, 362 B.R. 536 (S.D. Fla. 2007).

Debtor’s Schedules. At the time of filing the bankruptcy petition, or soon after, the debtor will file schedules listing, among other things, all real and personal property. The schedules that must be filed include: Real Property; Personal Property; Property Claimed as Exempt; Creditors Holding Secured Claims; Creditors Holding Unsecured Priority Claims; Creditors Holding Unsecured Nonpriority Claims; Executory Contracts and Unexpired Leases; Codebtors; Current Income of Individual Debtors, and Current Expenditures of Individual Debtors. The schedules are made under oath, and give great insight to the debtor’s financial condition. Further, because the schedules are made under oath, if the debtor fails to give honest and complete responses to the information requested therein, the debtor may be subject to having
his discharge denied.

**Exemptions.** The bankruptcy code provides that certain property is exempt from being used to pay creditors. The code allows states to choose the exemptions scheme available to any debtor filing for bankruptcy within its borders. Depending on the state of filing, a debtor may have either Federal, State, or both to choose from. Georgia has opted out of the Federal scheme. Therefore, Georgia debtors may only use Georgia’s exemptions. Below is a non-exhaustive list of common exemptions claimed by debtors in Georgia. All exemptions are found in O.C.G.A. section 44-13-100 unless stated otherwise.

Homestead—Real or personal property, including a co-op, used as a residence, up to $10,000. In the event title to property used for the exemption provided under this paragraph is in one of two spouses who is a debtor, the amount of the exemption is $20,000.00. Therefore, if title is held in only one married debtor’s names, but both spouses file jointly, the exemption increases by $10,000.00. Further, if title was held solely by the wife, and she filed an individual case, she could also claim a $20,000.00 exemption.

Personal Property—Motor vehicles up to $3,500; clothing, household goods, appliances, furnishings, books, musical instruments, animals, and crops up to $300 per item and $5,000 total; jewelry up to $500; personal injury recoveries up to $10,000; wrongful death recoveries needed for support.

Wages—For private and federal workers, either 30 times the state or federal hourly minimum wage or a minimum 75% of earned but unpaid earnings; whichever amount is greater. O.C.G.A. § 18-4-20.

Tools of Trade—Tools, books, and implements of trade up to $1,500.
Alimony and Child Support—Alimony and child support needed for support.

Wildcard—Any property up to $600 plus any unused homestead amount up to $5,000.

Plus—Federal non-bankruptcy exemptions (rarely apply).

Section 341 Creditor’s Meeting. For all chapters 7, 11, and 13, a creditors meeting will be held early in the process. The requirement for the meeting is set forth in section 341, so you may also hear it called a 341 meeting. The meeting is scheduled by the United States Trustee’s office and all creditors receive notice. The purpose of the meeting is to ensure that the debtor fairly and honestly represented their assets, income, and debts. The trustee, who administers the case, will ask the debtor questions, under oath, about a debtor’s finances and property. Creditors may also ask the debtor questions, however, a creditor’s ability to ask questions is often limited by the trustee. If a more extensive investigation is required, you will need to file a Motion for Rule 2004 Examination (discussed below). The 341 meeting is under oath and is recorded. If needed, you may obtain both the audio recording and a transcript of the 341 meeting afterward. I find that this is a good opportunity to develop facts for anticipated adversary proceedings or other similar issues.

Proof of Claim. The Bankruptcy Code defines a claim as: (1) a right to payment; (2) or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). A creditor must file a proof of claim in most cases, and it is advisable to file a Proof of Claim in all cases. Filing the proof of claim should usually be a creditor’s first action after having reviewed the petition and schedules. Unless objected to, a proof of claim establishes your debt for the purposes of the bankruptcy proceeding. The proof of claim form and many other official forms are available at http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx. Creditors are required to attach all supporting
documentation for their claim.

**Important Deadlines.** All bankruptcy chapters have filing deadlines that creditors must be aware of. Often these deadlines are contained in the bankruptcy notice received by each creditor, so creditors should pay close attention to their notice. Creditors should be aware of the following deadlines:

- **Objection to claimed exemptions**—30 days after conclusion of 341 meeting or amendment of exemptions, whichever is later.
- **Complaint to deny discharge or object to discharge**—60 days after date first set for 341 meeting.
- **File proof of claim**—For chapters 7 and 13, 90 days after date first set for 341 meeting or 90 days after notice of deadline is mailed. For Chapter 11, the court will set a claims bar date.
- **Objections to confirmation (Chapter 13) including objections to debtor’s Motion to Avoid Lien or to Value Collateral**—15 days after the conclusion of the creditor’s meeting.

**Objections to Claims.** The trustee in Chapter 7, or debtor in 11 or 13, may object to filed proofs of claim. Unless objected to, a creditor’s claim will be considered an allowed claim as stated in its proof of claim. 11 U.S.C. § 502. If objected to, the court will either set a hearing or will state that if no responses are received within a certain time frame, the relief requested by the debtor will be granted. Once a response has been filed, the matter becomes a contested matter governed by rule 9014, and the objection will then be heard by the judge. Once the debtor has put forth sufficient evidence to support its objection, the burden of proof lies with the creditor to prove the claim is valid by a preponderance of the evidence. *In re O’Callaghan*, 304
Rule 2004 Examination. The Rule 2004 Examination is basically a deposition taken through the bankruptcy process. It does not occur in every case, and must be ordered by the court after motion of any party in interest. The scope of a 2004 exam is broader than a deposition in a normal lawsuit. The scope is unfettered and broad and may be in the nature of a “fishing expedition.” In re Kelton, 389 B.R. 812 (S.D. Ga. 2008). Rule 2004 states, “The examination ... may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate. Additionally, in a case under Chapter 11 ... the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.”

Plan Confirmation (11 &13). In both a Chapter 11 and Chapter 13, a plan is proposed, and must be confirmed by the court. In both chapters, a hearing is scheduled and creditors in interest have the opportunity to object. The specifics of a confirmable plan are separate for each chapter, and will not be discussed herein. However, the requirements for a Chapter 13 plan can found at 11 U.S.C. section 1325, and for a Chapter 11 plan can be found at 11 U.S.C. section 1129.

Discharge. A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. The debtor is no longer legally required to pay any debts that are discharged. The discharge acts as a permanent injunction prohibiting the creditors of the debtor from taking any form of collection action on discharged debts. Certain debts are not available
for discharge. (A more comprehensive discussion of nondischargeable debts can be found below.) Although a debtor is not personally liable for discharged debts, a valid lien that has not been avoided or set aside in the bankruptcy case passes through the bankruptcy and will remain after the bankruptcy case. Therefore, a secured creditor may enforce the lien to recover the property secured by the lien. The timing of the discharge varies, depending on the chapter under which the case is filed. A debtor’s discharge is effective upon:

Chapter 7— In Chapter 7, the court usually grants the discharge promptly on expiration of the time fixed for filing a complaint objecting to discharge (60 days following the first date set for the 341 meeting). Typically, this occurs about four months after the date the debtor files the petition with the clerk of the bankruptcy court.

Chapter 11 – In Chapter 11, confirmation of the plan discharges the debtor from all debts that arose prior to the confirmation.

Chapter 13 – The court generally grants the discharge as soon as practicable after the debtor completes all payments under the plan. Since a Chapter 13 plan may provide for payments to be made over three to five years, a discharge in a Chapter 13 will take some time.

C. Rights of Creditors in Special Situations

Motion for Relief From Stay. Creditors often wish to pursue their rights against collateral pursuant to state law prior to the close of the case. In such a situation, a creditor must file a motion for relief from the automatic stay. Without obtaining relief, the creditor will be prohibited by the automatic stay from taking any action against its collateral. 11 U.S.C. section 362(d) provides that a creditor may obtain relief from the stay in the following circumstances:
On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

A motion for relief is considered a contested matter and subject to Rule 9014. The movant has the burden of proving whether or not there is any equity in the property, but the debtor has the burden of proof on all other issues. 11 U.S.C. section 362(g).

**Liens in Bankruptcy.** Unless some action is taken to affect a creditor’s lien, its lien will pass through bankruptcy unaffected, and a creditor will have the right to enforce the lien after the conclusion of the case. Liens in bankruptcy are classified as either security interests, judgment liens, or statutory liens. A security interest may be thought of as a voluntary lien. A common example of a security interest is a deed to secure debt or a mortgage. A judgment lien is a lien created by judgment. A statutory lien is a lien created by statute, such as a mechanic’s lien. The type of lien is important, in that each type has different rules for lien avoidance and stay violation.

**Motion to Avoid Lien.** A common situation faced by judgment creditors is the Motion to Avoid Judgment Lien. 11 U.S.C. section 522 states that a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which
the debtor would have been entitled to, if such lien is (A) a judicial lien, other than a lien secured by certain specified debts, or (B) a non-possessory, nonpurchase-money security interest in certain specified real property. Careful attention should be paid by the creditor to the relief sought by the debtor. A debtor can only avoid a lien to the extent that it impairs an exemption. If a lien only partially impairs an exemption, it should only be partially avoided, and not cancelled completely. Many motions and proposed orders seek to fully cancel judgment liens when they only partially impair exemptions. For example, consider a debtor that owns real property valued at $150,000.00, with a mortgage payoff of $100,000.00, an exemption of $10,000.00, and a judgment lien in the amount of $20,000.00. In this situation, the judgment lien may be partially, but not fully, avoided. The lien impairs the $10,000.00 exemption. Therefore, if the house were to sell after the conclusion of the bankruptcy for $120,000.00, the creditor should still take away $10,000.00. Contrarily, if the debtor’s judgment lien is only in the amount of $5,000.00, it impairs the exemption to the full extent of the lien and can be wholly avoided as to the real property.

**Nondischargeable Judgment.** Not all debts are capable of being discharged. The debts discharged vary under each chapter of the Bankruptcy Code. 11 U.S.C. section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, even though the debtor may obtain a discharge of most of its debts, a nondischargeable debt will still be owed after bankruptcy. After obtaining a nondischargeable judgment, a creditor may find that much of its competition for the debtor’s scarce resources has been eliminated.

The most common types of nondischargeable debts are: debts not scheduled or noticed by the debtor; debts for spousal or child support or alimony; debts for willful and malicious injuries
to person or property; most government-funded student loans; debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated; and debts for condominium or homeowners’ association fees incurred post-petition. 11 U.S.C. § 523. Most of these debts will automatically be considered nondischargeable. However, for certain debts (fraud, embezzlement, or intentional injury found in sections 523(a)(2), (4), and (6)), creditors must file an adversary proceeding to determine their dischargeability. An adversary proceeding is simply a complaint filed within the bankruptcy case that is tried as a separate lawsuit, and that is subject to most of the federal rules of civil procedure. Once the answer is filed, an adversary continues just as any lawsuit under the federal rules would. A scheduling order is generally entered which sets forth the discovery period and other important time frames.

An interesting rule regarding adversary proceedings lies in the service requirement. Pursuant to Bankruptcy Rule 7012(a), a defendant must serve an answer within 30 days after the issuance (not service) of a summons. Further, the plaintiff has 10 days within which to mail a summons from the date of its issuance. Service by mail is valid service pursuant to Rule 7004. Therefore, a defendant in an adversary proceeding may have only days to file its answer upon receipt of the summons and complaint.

A debtor in a Chapter 13 case has available to it a broader discharge than is available to a Chapter 7 debtor. Debts dischargeable in Chapter 13, but not in Chapter 7, include debts for willful and malicious injury to property, debts incurred to pay nondischargeable tax obligations, and debts from property settlements in divorce proceedings. 11 U.S.C. § 1328. Further, a business entity may not obtain a discharge in Chapter 7. Therefore, in these circumstances, a creditor would have no need to file an adversary seeking to have these debts declared nondischargeable.
**Objection to Discharge.** The debtor does not have an absolute right to a discharge. Either the trustee or a creditor may file an objection to discharge. Just as with nondischargeable judgments, an objection to discharge must be initiated with an adversary proceeding. As stated above, the deadline for objecting to the discharge may be found in the notice sent to each creditor upon the filing of the bankruptcy case. Section 727(a) sets forth the situations in which an objection to discharge may be raised. These situations include failure to provide requested tax documents; transfer or concealment of property with intent to hinder, delay, or defraud creditors within the one year prior to filing bankruptcy; destruction or concealment of books or records; perjury and other fraudulent acts; and the failure to account for the loss of assets. The burden of proof lies with the plaintiff to prove the objection. If successful, an objection to discharge will bar any debts from being discharged, not only the creditor who successfully pursued the claim.

**II. Unsecured Creditor Committees**

An Unsecured Creditor Committee is a small group of general unsecured creditors that are chosen by the Trustee’s office to work for the unsecured creditors as a whole. Creditor Committees are often but not always appointed in Chapter 11 cases and may also be selected in Chapter 7 cases. They consist of those unsecured creditors that have accepted the Trustee’s request to serve, and will only be appointed when a sufficient number of unsecured creditors express an interest to serve. The committee may hire a lawyer to represent it.

The committee has a fiduciary duty to make decisions for all unsecured creditors, and not simply for their individual interests. Therefore, unsecured creditors may not wish to take on the role. However, depending on the circumstances, serving on a creditors committee may have significant advantages. For instance, the committee’s attorneys’ fees are paid by the debtor. Further, the opinions of the group as a whole, in formation of the Chapter 11 plan or other issues,
may be given greater weight than would be given to a single creditor.

III. Appointment of Trustee

The United States Trustee has a role in every bankruptcy case, no matter the chapter, to ensure that the case is administered fairly and efficiently. However, certain case specific trustees may also be appointed by the U.S. Trustee. For instance, a Chapter 7 Trustee is appointed in almost every Chapter 7 case.

Chapter 7 Trustee. The Chapter 7 will usually be automatically appointed to each case in the very early stages. The trustee’s duty is to act for the benefit of the creditors in the administration of the estate, and specifically include: collecting and reducing to money the property of the estate; to be accountable for all property received; to investigate the financial affairs of the debtor; to examine proofs of claims and to object to the allowance of any claim that is improper; to oppose discharge of the debtor, if proper; and to furnish such information concerning the estate and the estate’s administration as is requested by a party in interest. 11 U.S.C. § 704.

Chapter 11 Trustee. As with a Chapter 7 case, the U.S. Trustee will oversee the Chapter 11 case administration. However, unlike a Chapter 7, the debtor in a Chapter 11 acts as “debtor in possession” and has very similar duties as does a Chapter 7 trustee. 11 U.S.C. § 1107 Generally, the Chapter 11 debtor in possession has a fiduciary duty to act on behalf of its creditors. However, if the debtor in possession does not fulfill this requirement, a Chapter 11 trustee may be appointed. A Chapter 11 trustee will be appointed if the debtor in possession commits fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, or for other cause, or if it appears that such appointment is in the interest of the creditors. 11
U.S.C. § 1104. Appointment of a Chapter 11 trustee is generally reserved for only the most severe situations.

IV. Dismissal and Conversion

The debtor in possession in a Chapter 11 has the absolute right to convert the case to a Chapter 7 case, but only once, unless: the debtor is not a debtor in possession; the case was commenced as an involuntary case; or the case was converted to Chapter 11 from another chapter at another’s request. 11 U.S.C. § 1112. A Chapter 11 debtor, however, does not have an absolute right to dismiss its case.

Further, a party in interest may file a motion to dismiss or convert a Chapter 11 to a Chapter 7 for “cause.” The code gives a non-exhaustive list of what constitutes cause at 11 U.S.C. section 1112(b)(4), which includes: substantial or continuing loss to or diminution of the estate; gross mismanagement of the estate; failure to maintain appropriate insurance; unauthorized use of cash collateral; and material default by the debtor with respect to a confirmed plan. If a creditor in interest seeks dismissal, but the court finds that dismissal is not in the best interest of the creditors and the estate, the court may decide to appoint a Chapter 11 trustee.

Cause has also been interpreted by courts to include a bankruptcy filing made in bad faith. There is no particular test for determining whether a debtor has filed a petition in bad faith. Instead, the courts may consider any factors which evidence an intent to abuse the judicial process of the reorganization provisions. In particular, courts consider factors which evidence that the petition was filed to delay or frustrate the legitimate efforts of secured creditors to enforce their rights. The United States Court of Appeals for the Eleventh Circuit set forth six factors which evidence a bad faith filing:

(1) The debtor has only one asset, real property, in which it does not hold legal title;
(2) The debtor has few unsecured creditors whose claims are small in relation to the claims of the debtor’s secured creditors;

(3) The debtor has few employees;

(4) The debtor’s real property is the subject of a foreclosure action as a result of arrearages on the debt;

(5) The debtor’s financial problems involve essentially a dispute between the debtor and the debtor’s secured creditors, which can be resolved through state law; and

(6) The timing of the debtor’s filing evidences an intent to delay or frustrate the legitimate efforts of the debtor’s secured creditors to enforce their rights.

Phoenix Piccadilly, Ltd., 849 F.2d 1393 (11th Cir. 1988). While this list is not exhaustive, it is a good standard by which to judge whether a petition has been filed in good faith.