

## PUBLICATION UPDATE

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# Collier Bankruptcy Practice Guide

Publication 200      Release 117L

August 2021

## HIGHLIGHTS

### Chapter Revisions.

- The chapters on the following subjects have been revised and updated: automatic stay; contempt; use, sale and lease of property; obtaining credit; executory contracts; reaffirmation; protection against discrimination; and cramdown.

### New Local Rules Pamphlets.

- Updated local rules pamphlets are issued for the First, Second, Seventh and Ninth (non-California) Circuits.

**Consolidated Appropriations Act, 2021, Pub. L. No. 116-260** (2020). The Consolidated Appropriations Act, 2021 (the “CAA”) contained temporary amendments to 15 sections of the Bankruptcy Code: 364; 365; 366; 501; 502; 503; 507;

525; 541; 547; 1191; 1225; 1325; 1328; 1329. These amendments are referenced and explained in the pertinent chapters revised in this release. For instance, the revisions to Chapters 50 and 51 include a discussion of the manner in which Forbearance Claims under the CARES Act, Pub. L. No. 116-136 (2020), are to be filed pursuant to provisions of the CAA. Similarly, revised Chapter 54 addresses changes to section 507(d) of the Code (subrogation) made by the CAA. The CAA also made changes to section 547 of the Code (see Chapter 64) dealing with transactions between a debtor and certain types of creditor transactions brought about by the COVID-19 crisis.

### Automatic Stay/Relief from Stay.

Chapter 38 discusses the legal, tactical and procedural issues involved in seeking stay relief. The release 117 revision primarily focuses on the re-

cent Supreme Court decision in *City of Chicago v. Fulton*, 141 S. Ct. 585, 208 L. Ed. 2d 384 (2021), which held that a creditor does not violate the automatic stay of Code section 362(a)(3) by “merely” retaining property lawfully seized prior to the filing of a bankruptcy petition. The Court clarified that debtors seeking return of the repossessed or seized property must file a motion for turnover pursuant to section 542(a), which can implicate adequate protection provisions under section 363(e). The chapter also notes a new, statutorily added exception (see Pub. L. No. 116-189 (2020)) to the automatic stay provisions of section 362(a)(1). Section 362(b)(29) excepts from section 362(a)(1) the commencement or continuation of an action by a competing amateur sports organization to replace an existing national governing body or by the United States Olympic and Paralympic Committee to revoke the certification of an existing national governing body.

**Contempt.** Revised Chapter 40 discusses the bankruptcy court’s bases of power to punish for contempt, and includes a review of the general principles of contempt and the grounds for a determination of civil contempt. The current update reviews lower court decisions applying the 2019 Supreme Court case of *Taggart v. Lorenzen*, which permitted a bankruptcy court to hold a creditor in contempt only “where there is no objectively reasonable basis” for concluding that the creditor’s conduct might be lawful. The revision references the Ninth Circuit’s decision on remand in *Taggart*,

which, after review of the record, determined that the creditor might have had an objectively reasonable basis to conclude that Taggart might have “returned to the fray.” However, for typical post-discharge contempt proceedings, courts have continued to hold creditors in contempt for violation of the discharge injunction when creditors have been unable to articulate an objectively reasonable basis for their conduct.

**Reaffirmation of Debts.** Chapter 77 has been updated with recent case law surrounding issues relating to attorney certifications on reaffirmation agreements, including the effect of failing to sign the certification and when and whether a court may look behind a certification. Discussed is the Ninth Circuit’s decision in *Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946 (9th Cir. 2020), which held that reaffirmation is unnecessary to reimpose personal liability when personal property leases are assumed by debtors under section 365(p). The section on impermissible reaffirmation substitutes has been expanded in light of the Supreme Court’s decision in *Taggart v. Lorenzen*. The revision also covers the ABI’s Commission on Consumer Bankruptcy’s recommendations for reaffirmation agreements.

**Bankruptcy Discrimination.** Chapter 78 addresses section 525 of the Bankruptcy Code, the provision that prohibits various forms of discrimination against bankruptcy debtors. The chapter has been updated to

address several developments related to the COVID-19 pandemic. The Small Business Administration's rules for the Paycheck Protection Program ("PPP") included an eligibility bar applicable to bankruptcy debtors. The exclusion led to considerable litigation and produced conflicting, but illuminating, interpretations of the scope of section 525. In addition, the revised chapter discusses two temporary amendments to the Code enacted by Congress in response to the pandemic. An amendment to section 366 limits the right of a utility to demand lump sum deposits after a bankruptcy filing. An amendment to section 525 protects debtors from discrimination with respect to certain types of housing relief made available under the CARES Act.

**Cramdown.** In addition to incorporating the most recent circuit level decisions, the revision to Chapter 92 expands the examination of good faith under Code section 1129(a)(3), collecting cases applying both substantive and procedural interpretations of the paragraph. The update also expands the discussion of unfair discrimination in line with the Third Circuit's *Tribune* decision.

**New Authors.** With release 117, *Collier Bankruptcy Practice Guide* welcomes two new authors:

Judge Michelle M. Harner, U.S. Bankruptcy Court for the District of

Maryland, has assumed responsibility for Chapter 44, "Obtaining Credit." Before her appointment to the bench, Judge Harner served as the Francis King Carey Professor of Law and the Director of the Business Law Program at the University of Maryland Francis King Carey School of Law.

Nate Juster, of Jones & Walden, LLC, in Atlanta, is now the author of Chapter 77, "Reaffirmation of Debts." He is a former clerk for the Honorable Amy Totenberg (N.D. Ga.) and the Honorable Mary Grace Diehl (Bankr. N.D. Ga.). Between his clerkships, he worked as a staff attorney at Atlanta Legal Aid Society specializing in bankruptcy and foreclosure defense.

**Other Revision.** This release also includes revisions to the following chapters:

- Chapter 20, Partnership and Partner Bankruptcies;
- Chapter 43, Use, Sale and Lease of Property;
- Chapter 44, Obtaining Credit;
- Chapter 68, Executory Contracts and Unexpired Leases;
- Chapter 92, Distribution Under the Plan;
- Chapter 101, Administration of the Chapter 13 Case and the Chapter 13 Plan.

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