CHAPTER I

INTRODUCTION

A. PURPOSE

The purpose of this seventh edition of the *North Carolina Bankruptcy Practice Manual* (“the Manual”) is three-fold. First, it is designed to provide lawyers who have little or no experience in the bankruptcy field with a practical, working knowledge of the subject. Second, its aim is to provide lawyers who do have experience in the bankruptcy field with a comprehensive point of reference from which to begin the search for an answer. Finally, it has been updated to provide attorneys with case law analysis of the legal and practical implications of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, “BAPCPA”), which went into effect on October 17, 2005.

The information contained in the Manual is designed to cover most problems and issues that confront trustees and lawyers in an average bankruptcy matter, and contains information that will be particularly useful to North Carolina attorneys. However, the Manual is not intended to be an exhaustive treatment of those problems and issues. Bankruptcy is an increasingly specialized and technical field, and the Manual is primarily intended as a procedural guide and not a digest of substantive law. Although every effort has been made to address adequately the problems and issues, there may be many facets to an issue which, in the interests of time and space, could not be treated here, but which should not be overlooked. Accordingly, it is recommended that the Manual be used in conjunction with the treatises and other sources listed below.

B. BANKRUPTCY LAW AND PROCEDURE — OVERVIEW

The oldest source of bankruptcy law is the United States Constitution, which gives Congress the power to establish uniform laws on bankruptcies. Congress, which enacted bankruptcy statutes in 1800, 1841 and 1867 with repeal of each following shortly after enactment, finally passed a comprehensive bankruptcy statute, the National Bankruptcy Act of 1898 (“the Bankruptcy Act”), which endured for 80 years.

Since the 1970s, bankruptcy law has undergone major changes. On October 1, 1979, the Bankruptcy Reform Act of 1978 (“the Bankruptcy Code”) repealed and replaced the Bankruptcy Act; however, the Bankruptcy Act continues to govern those cases, if any remain, commenced on or before September 30, 1979. Furthermore, the Bankruptcy Act is the source of many of the provisions and policies of the Bankruptcy Code, thus giving relevance to legislative history and judicial interpretation of the Bankruptcy Act. The Bankruptcy Code is codified in Title 11 of the United States Code, and this Manual will use “Bankruptcy Code” to refer to the bankruptcy laws generally, to specific statutory sections in the Bankruptcy Code, and also to Title 11.

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In 1982 the United States Supreme Court declared the jurisdiction of the bankruptcy court unconstitutional. As a result, on July 10, 1984, the Bankruptcy Code was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“the 1984 Amendments”). In the interim, the Judicial Conference of the United States proposed an emergency rule that was adopted as a local rule in all judicial districts to keep bankruptcy courts operating while Congress cured the constitutional difficulty. Although the jurisdictional portions of the 1984 Amendments became effective immediately, the substantive amendments became effective 90 days thereafter, on October 9, 1984, and applied to cases filed after that date.

The Bankruptcy Code was further amended on October 27, 1986, with the enactment of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (“the 1986 Amendments”), which became effective on November 26, 1986. The 1986 Amendments authorized an additional 52 bankruptcy judges, made the US trustee system permanent and nationwide, and introduced a totally new chapter designed to accommodate the needs of the insolvent farmer-debtor. The 1986 Amendments were themselves amended on December 1, 1990, by the Judicial Improvements Act of 1990 (“the 1990 Amendments”) to extend the time period in which the judicial districts of Alabama and North Carolina remained outside the US trustee system and to address the standing of a bankruptcy administrator in a bankruptcy case. The Criminal Violations Protection Act of 1990, enacted on November 15, 1990, also made several amendments to the Bankruptcy Code relating to the nondischargeability of debts. On October 22, 1994, the Bankruptcy Reform Act of 1994 (the “1994 Reform Act”) was enacted, making substantial changes to the Bankruptcy Code, including the creation of the Bankruptcy Review Commission.

The most recent and comprehensive amendments to the Bankruptcy Code are found in BAPCPA, which was signed into law on April 20, 2005. BAPCPA was designed to address a perceived abuse of the Bankruptcy Code, and endeavored to require debtors to repay a greater portion of their debt. In addition, BAPCPA authorized an additional 28 bankruptcy judgeships in 20 judicial districts. Most of the provisions of BAPCPA went into effect for cases filed on or after October 17, 2005, though a few provisions apply to cases pending on April 20, 2005. BAPCPA included many controversial provisions, and many of these provisions still need to be more fully explained and developed through judicial interpretation.

Following the original enactment of the Bankruptcy Code, the United States Supreme Court appointed an Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States to formulate procedural rules and official forms. The committee, which in 1979 drafted Interim Bankruptcy Rules and forms for guidance, completed the new Bankruptcy Rules and Official Forms, which became effective August 1, 1983 (“the Bankruptcy Rules”). The Bankruptcy Rules govern the procedural aspects of bankruptcy cases. As a result of the 1984 Amendments, it was necessary to make certain amendments to the Bankruptcy Rules. Accordingly, the United States Supreme Court approved numerous amendments that became effective on August 1, 1987. In addition, on February 5, 1987, the Advisory Committee on Bankruptcy Rules submitted proposed interim rules and forms for Chapter 12 cases and recommended adoption of
the proposed interim rules. Since the proposed interim rules were not then approved, they were binding only to the extent adopted as local rules or made applicable to a particular case by a judge.

Amendments to the Bankruptcy Rules that, among other things, accommodate the provisions of the 1986 Amendments relating to Chapter 12, were also approved by the Advisory Committee and, on November 19, 1990, presented to the US Supreme Court, which then forwarded them to Congress. Once approved by Congress, the proposed amendments to the Bankruptcy Rules became effective on August 1, 1991, and are known as the Federal Rules of Bankruptcy Procedure (“the Bankruptcy Rules”). The Advisory Committee has over the years proposed amendments to the Bankruptcy Rules that are essentially technical in nature, which have been approved by Congress and are now in effect. After the passage of BAPCPA, an overhaul of the Bankruptcy Rules was required to implement the provisions of BAPCPA. Because the rulemaking process takes several years, the Advisory Committee recommended Interim Rules, which each district adopted on a local level until the Interim Rules became permanent in December 2008.

On September 12, 1990, the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States approved revised Official Bankruptcy Forms, which took effect on August 1, 1991. The Official Bankruptcy Forms have been amended at various times since that date, most recently effective December 1, 2011, incorporating changes made necessary by BAPCPA and the Interim Rules.

The Eastern, Middle and Western Districts of North Carolina have established local rules that also govern procedure in each respective district, and copies of the local rules are contained on each court’s website. The local rules for each district, amended from time to time, are a crucial part of procedure and must be consulted whenever participating in a bankruptcy case.

C. SOURCE MATERIALS

The Bankruptcy Code has generated the publication of many articles, journals and treatises. Some of the following may be useful for further study or as library additions:

1. COLLIER ON BANKRUPTCY (Alan N. Resnick & Henry J. Somme reds., 16th ed. rev. 2011): This 19-volume treatise, plus several volumes containing appendices, an index and a table of cases, is one of the most complete and elaborate publications on bankruptcy law. It is a loose-leaf collection continually updated as changes in bankruptcy law occur. A smaller version is also available. Matthew-Bender, which publishes the treatise, also publishes Collier Bankruptcy Cases, which is a compilation of reported bankruptcy cases.

2. Bankruptcy Reporter: This West publication reports all bankruptcy cases throughout the United States. It is well-indexed and includes advance sheets containing the most recent decisions.

3. Bankruptcy Court Decisions: This is an excellent loose-leaf publication published by C.R.R. Publishing Co., which indexes bankruptcy court decisions by Bankruptcy
Code section number in digest form with references to the full text of cited cases appearing throughout the volumes.

4. *The American Bankruptcy Law Journal*: This journal is published quarterly by the National Conference of Bankruptcy Judges and contains articles of interest on bankruptcy and related topics. The journal may be ordered at Post Office Box 983, Lexington, Kentucky 40583.

5. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE (3d Ed. 2010): This multi-volume treatise is published by Callaghan and Company and is less technical and easier to understand than *Collier on Bankruptcy*.

6. *The Disclosure Statement*: This newsletter, published by the Bankruptcy Section of the North Carolina Bar Association and formerly known as *The Bankruptcy Lawyer*, is an excellent source of recent developments in bankruptcy law in North Carolina. Members of the Bankruptcy Section of the North Carolina Bar Association receive the newsletter.

D. PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978 AND ITS AMENDMENTS

The Bankruptcy Code consists of four titles:

1. Title 1 codified and enacted the Bankruptcy Code and what became the Bankruptcy Code. This Title contains the substantive law on bankruptcy.

2. Title 2 is a series of amendments to Title 28 of the United States Code and to the Federal Rules of Evidence. These amendments established the bankruptcy courts, created court jurisdiction, provided the court system with a staff, and further established appellate practice procedures and other necessary operating objectives for the bankruptcy court system. Much, if not all, of this title was superseded by the Bankruptcy Amendments and Federal Judgeship Act of 1984.

3. Title 3 contains technical and conforming amendments. The purpose of these amendments was to bring all sections of the United States Code into conformity with the Bankruptcy Code.

4. Title 4 contains provisions that cover the transition period between the enactment of the Bankruptcy Code and the effective dates of the various provisions. Title 4 also includes a provision for an experimental United States trustee system to study the feasibility of a uniform federal trustee system.

As already noted, the 1984 Amendments were signed on July 10, 1984 to address fundamental jurisdictional defects identified by the United States Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 459 U.S. 50 (1982), which held that the Bankruptcy Reform Act of 1978 violated Article III of the Constitution. The 1984 Amendments addressed the jurisdictional problems by providing for Article I bankruptcy judges. The 1984 Amendments also made significant changes to the Bankruptcy Code to respond to concerns that debtors were abusing the bankruptcy system.
The 1984 Amendments are divided into three titles, as follows:

1. Title 1 creates a new bankruptcy court and amends the provisions of the Bankruptcy Reform Act of 1978 that were held unconstitutional in the Marathon Pipe Line decision.
2. Title 2 creates 85 additional district and circuit court judgeships.
3. Title 3 amends the Bankruptcy Code, making changes in the areas of consumer credit, rejection of labor contracts, grain storage facility bankruptcies, shopping center bankruptcies, discharge of debts incurred by drunk drivers, repurchase agreements and time share agreements.

The 1986 Amendments provide a number of substantive, as well as procedural, changes to the Bankruptcy Code, and are also divided into three titles, as follows:

1. Title 1 authorizes the appointment of an additional 52 bankruptcy judges and makes the US trustee system permanent and nationwide under the control of the Attorney General of the United States.
2. Title 2 makes several technical corrections to the Bankruptcy Code and introduces a new chapter, Chapter 12, to provide for adjustments of debts of a family farmer with regular annual income.
3. Title 3 provides for the expiration of the terms of US trustees presently in office and provides for other transitional and administrative provisions under the 1986 amendments.

The 1994 Reform Act enacted numerous substantive changes to the Bankruptcy Code. The 1994 Reform Act consists of seven titles, as follows:

1. Title I (Bankruptcy Administration Issues) provides sweeping changes with respect to 17 primary categories: (1) concluding the final hearing on a motion for relief from the automatic stay; (2) appeal of orders reducing or extending the debtor’s exclusive period for filing a plan of reorganization; (3) expedited procedure for the reaffirmation of debts; (4) authorization of status conferences to fix dates for various Chapter 11 matters and active support for the establishment of bankruptcy appellate panels in each circuit; (5) adjustment of bankruptcy administrator authority in specified areas to comport with US trustee authority; (6) authorization of appointment of the Federal Deposit Insurance Corporation, the Pension Benefit Guaranty Corporation, and state employee pension funds to creditors’ committees; (7) increase in disbursement percentage awards to trustees; (8) increased dollar amounts provided in the Bankruptcy Code, including those underlying Chapter 13 eligibility; (9) requirement of pre-merger notification of the Department of Justice and the Federal Trade Commission to allow review of antitrust implications; (10) authorization of reimbursement from the debtor’s estate of reasonable expenses incurred by creditors’ committee members; (11) authorization