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Bankruptcy Essentials

Navigating Executory Contracts, Claims, Plans, Preference and
Fraudulent Transfers

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Welcome and Some Housekeeping Items

- Be sure to sign-in for MCLE Credit at the registration desk.
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- Watch for the survey/feedback link sent to your email after the program.

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Michael Brandess



Partner | Husch Blackwell

Michael has substantial experience guiding clients through the process of buying and selling assets out of bankruptcy, including operating assets and intellectual property. He also regularly represents clients in resolving disputes in the context of financial distress, including loan workouts and negotiations involving trade relationships.



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James Gansman



Founder | Rock Creek Advisors

James Gansman is a Founder partner at Rock Creek Advisors. He has done more than 150 transactions worth over \$17 billion. He has worked with many different industries like Retail, Consumer Products, SAAS, and Medical Devices. James has been a lender, borrower, and buyer and knows a lot about helping businesses get out of debt. Before he started Rock Creek Advisors, James worked at Sherwood Partners. He also worked for 12 years at a Big 4 accounting firm. James has a lot of experience and is good at helping both Rock Creek’s team and clients.



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Brian Slade



**Associate General Counsel | Fortune
Brands Innovations**

Brian is a corporate and commercial attorney with over 15 years of in-house and law firm experience advising clients on a wide range of business and commercial matters, including: commercial transactions; mergers, acquisitions and other strategic transactions; litigation; antitrust and competition law compliance; consumer products regulation; corporate governance; compliance; '34 Act securities regulation; and capital markets transactions.



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What should the GC be thinking about when a customer or vendor’s insolvency is in the cards?



- When a customer or vendor goes bankrupt, what happens?
- What should you be thinking about?
- What information is available?
- Is there a buying opportunity?
- How do you protect your rights?
 - Creditors’ committee?

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Types of Insolvency Proceedings

US

- Bankruptcy
- Receivership (federal or state)
- Assignment for the benefit of creditors (ABC)
- Foreclosure (strict or public)

Canada

- CCAA
- Receivership
- Bankruptcy

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Non-Bankruptcy Insolvency Proceedings

- Types
 - Receivership (federal or state)
 - Assignment for the benefit of creditors (ABC)
 - Foreclosure (strict or public)
- Asset purchases
- Creditor issues
- In-house perspective

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Types of US Commercial Bankruptcy Proceedings

- Chapter 11: Reorganization (or liquidation)
 - Can continue in business during bankruptcy
 - Might be run by existing management (DIP)
 - Requires plan and disclosure statement (discussed later)
- Subchapter V: Ch. 11 for Smaller Businesses
 - Chapter 11 light
- Chapter 7: Liquidation
 - Self explanatory
- Chapter 15: Recognition of Foreign Proceeding
 - For companies incorporated in foreign countries but with material assets in US

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Pre-Bankruptcy Steps for Trade Creditors when Bankruptcy is in the Cards

 Change credit terms	- COD - POA
 Credit insurance	
 Carefully watch for delays in payment timing	
 Monitor scuttlebutt / customer contacts	
 Refuse shipping	
 Review contract terms to assess rights / remedies (e.g., termination?)	
 Invoice tricks (discussed in preferences slide)	
 P.O.s Identification as Non-Executory	

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Asset or Loan Purchase Opportunities

- 363 sales (free and clear) v. non-bankruptcy
- Means of acquiring assets
- Credit bidding
- Stalking horse bidding
- Due diligence (light)
- In-house perspective

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Initial Actions Upon Vendor/Customer Bankruptcy Filing

Review	Assess	Assess	Review	Alert	Assess
<div>Review contract to assess rights and remedies</div> <div><ul style="list-style-type: none">• Might be possible to terminate contract or to gain leverage in any go-forward transactions• If no contract, suspend transactions (at least temporarily)</div>	<div>Assess whether you took any preemptive steps (last slide)</div>	<div>Assess status of shipments (temporarily hold anything in transit until you get clarity)</div>	<div>Review case filings to assess what company intends to do</div>	<div>Alert AR team to avoid stay violations (discussed later)</div>	<div>Assess how much you're owed</div> <div><ul style="list-style-type: none">• Critical vendor status? And implications of accepting.• Creditors' committee (discussed later)</div>

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Schedules

- Schedules: list all of the debtor’s assets, liabilities, and certain other important aspects concerning the debtor’s business, such as:
 - Schedule A: Lists real property, such as land, homes, and timeshares
 - Schedule B: Lists personal property, such as vehicles, household goods, bank accounts, stocks, and retirement accounts
 - Schedule C: Lists state and federal exemptions that the debtor is claiming
 - Schedule D: Lists secured creditors and the collateral for their debt
 - Schedule E: Lists priority debts
 - Schedule F: Lists unsecured debts
 - Schedule G: Lists leases and executory contracts
 - Schedule H: Lists more than one party that may be financially responsible for a debt
 - Schedule I: Lists a debtor's household income, such as wages, child support, and pension
 - Schedule J: Lists a debtor's monthly budget or list of expenses
 - NOTE 1: look for your claim on Schedule F
 - NOTE 2: look for your contracts (or purchase orders) on Schedule G

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Statement of Financial Affairs (SOFA)

- A debtor's Statement of Financial Affairs (SOFA) includes detailed information about their financial history and current financial status. The SOFA is a questionnaire that helps the bankruptcy court determine the debtor's ability to pay off their debts. It typically covers the past two years and includes the following information:
 - Assets
 - Real estate, vehicles, bank accounts, investments, retirement accounts, and other valuable possessions
 - Liabilities
 - Debts, loans, credit card balances, mortgages, tax obligations, and other financial obligations
 - Payments
 - Details of payments made within the last 90 days, and payments made to insiders at least one year prior to the bankruptcy petition date
 - Gifts and contributions
 - Any money or gifts given to someone that reduced your finances, such as church tithes or charitable donations
- NOTE: look for whether you have potential preference exposure on SOFA 3(b) (preference discussion later in presentation)

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What is the Automatic Stay?

Immediately after a bankruptcy case is filed, an injunction (called the "Automatic Stay") is generally imposed against certain creditors who want to start or continue taking action against a debtor or the debtor's property. Bankruptcy Code Section 362 discusses the Automatic Stay.

Stay is essentially an injunction against collection efforts that automatically springs upon bankruptcy filing

Creditors can obtain relief from the automatic stay in certain limited instances

In plain English, the automatic stay means that a creditor cannot attempt to collect on a prepetition debt during the bankruptcy proceeding

Creditors can receive sanctions for violating the automatic stay (but if inadvertent, usually get a warning)

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What is an Executory Contract

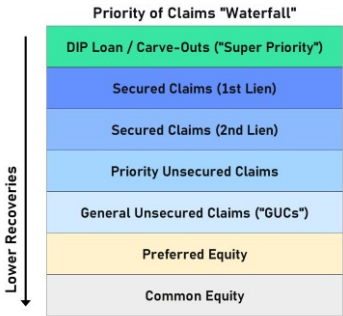
- An executory contract is a contract where both parties have unperformed obligations, and if either party fails to perform, it would be a material breach. This means that the other party would be excused from performing.
- Can be a purchase order, an agreement to continue providing goods or services, etc.
- If a creditor has an executory contract, it cannot stop providing goods or services under the contract solely because of the bankruptcy filing (even if creditor has significant pre-bankruptcy AR)
- Goods or services will receive administrative priority (defined later) payments for goods or services provided post-bankruptcy (creditor should receive full payment)

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Types of Claims

- General Unsecured Claim
 - Secured claim
 - Administrative priority claim
 - 503(b)(9)
 - Reclamation
 - Rejection Damages
 - Cure Claim (new debtor tricks)
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- Note 1: Make Sure to File Claim by Bar Date! Unless properly scheduled in a chapter 11.
 - Note 2: Discuss Claim Purchasers



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Bankruptcy Plans and Post-Effective Date Trusts

- Bankruptcy plan: contract that binds all parties to certain specified treatment
- Can be a liquidating plan or a plan of reorganization
- Only way to distribute money to unsecured creditors

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Preferences (11 U.S.C. 547(b))

- (b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—(1)to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—(A)on or within 90 days before the date of the filing of the petition; or
- (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—(A)the case were a case under chapter 7 of this title;
- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

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Preference Defenses (11 U.S.C. 547(b))



No prima facie case (invoice trick, POA, etc.)



Ordinary course of business



Subsequent new value



Contemporaneous exchange of new value






Fraudulent Transfers

- Actual: transfer made with intent to hinder, delay, or defraud creditor
- Constructive: transfer for lack of reasonably equivalent value (e.g., your house for \$1)
- Good Faith Transferee Defense (548(c))
- 548
 - Transfers that occurred in the 2 years before bankruptcy
- 544 (ropes in state fraudulent conveyance laws)
 - Depends on state law, but often reaches back up to 4 years

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Creditors' Committees

-  Committee of holders of general unsecured claims against debtor
-  Formed by US Trustee, usually early in chapter 11 cases, usually from creditors holding largest debts
-  Committee has a fiduciary duty to protect rights of all unsecured creditors (fight for a return on debt when debtor and secured lender try to railroad unsecured creditors)
-  Can be a cost-effective way to participate in bankruptcy case
-  Often has other material benefits

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Questions?