

# COMPARATIVE BUSINESS BANKRUPTCY

Edmund Adams,  
Professor

## **Outline**

- I. Introduction**
- II. The American Legal System – Law School**
- III. The American Legal System – The Courts**
- IV. Bankruptcy Reorganization - Fundamentals: Priority of Claims, Reasons for Reorganization and the Players**
- V. Planning, Venue and the Start of the Case**
- VI. Managing the Case**
- VII. The Plan of Reorganization**
- VIII. Municipal Bankruptcies**
- IX. Miscellaneous**
- FINAL EXAM**
- POWERPOINT**

## Outline

### **I. Introduction**

### **II. The American Legal System – Law School**

#### **A. Law School Requirements.**

1. University Degree
2. Law School Admission Test

#### **B. Law Schools.**

1. Cost
2. Courses
3. Socratic Method of Teaching
4. Practical Experiences
  - (a) Practice Trials
  - (b) Moot Court
  - (c) Law Review
  - (d) Summer clerkships

#### **C. After Law School Graduation.**

1. State Bar Examination
2. Alternative Jobs
  - (a) Law Firms
  - (b) Court Clerkships
  - (c) Corporate Law Departments

- (d) Business
- (e) Government; Politics

### **III. The American Legal System – The Courts**

#### **A. Federal Courts.**

1. Federal District Courts
  - (a) Federal Question Jurisdiction
  - (b) Diversity of Citizenship Jurisdiction
  - (c) Class Action Jurisdiction
2. Bankruptcy Courts
  - (a) Consumer cases
    - (1) Chapter 7 Liquidation Cases
    - (2) Chapter 13 Wage Earner Cases
  - (b) Business cases
    - (1) Chapter 7 Liquidation Cases
    - (2) Chapter 11 Reorganization Cases
    - (3) Chapter 9 Municipal Reorganizations
3. Bankruptcy Appellate Courts (BAPs)
4. Circuit Courts of Appeal
5. United States Supreme Court
6. Appointment and Tenure of Federal Judges

#### **B. State Courts.**

1. Trial Courts
2. Appellate Courts

3. Supreme Courts
4. Election/Appointment and Tenure of State Court Judges

#### **IV. Bankruptcy Reorganization - Fundamentals: Priority of Claims, Reasons for Reorganization and the Players**

##### **A. Types of Cases**

1. Voluntary
2. Involuntary

##### **B. The Filing of the Reorganization Case**

1. Filings
2. Preparation

##### **C. Absolute Priority Rule**

1. Secured Creditors
2. Costs and Expenses of Administration
3. Other Priority Claims: Employee Wages, Taxes and Lease Claims
4. General Unsecured Creditors
5. Shareholders/Owners

##### **D. The Reorganization Process**

1. Nature of the Process
2. What It Accomplishes
  - (a) Allows Tempers to Cool
  - (b) Allows the Debtor to Stabilize its Business
  - (c) Levels the Playing Field
  - (d) Allows for Good Look at Debtor's Finances and Operations

- (e) Allows Alliances to Form and Negotiations to Begin
- (f) Allows a Consensus to Build
- (g) Allows Time to Handle Holdouts
- (h) Centralizes Disputes in the Bankruptcy Court
- (i) Allows for Formulation and Confirmation of a Plan
- (j) Allows Debtor Time to Sink or Swim

3. Likelihood of Success

E. The Players and Their Roles.

- 1. Debtor-in-Possession (DIP)
- 2. Secured Creditors
  - (a) Working Capital Lender
  - (b) Equipment Lessor
  - (c) Real Estate Mortgage Holder
  - (d) Taxing Authorities
- 3. Unsecured Creditors Committee
- 4. Equity Committee
- 5. Parties to Executory Contracts and Unexpired Leases
- 6. U.S. Trustee
- 7. Examiner; Trustee
  - (a) Examiner – Grounds to appoint:
    - fraud, dishonesty, etc.
    - interest of creditors, shareholders or other parties
    - debts over \$5 million

- (b) Trustee – Grounds to appoint:
  - fraud, dishonesty, etc.
  - interest of creditors, shareholders or other parties
  - grounds to dismiss or convert the case
  - motion of U.S. Trustee on suspicion of management fraud, dishonesty or criminal conduct
- 8. Bankruptcy Judge
- 9. The Professionals
  - (a) Lawyers
  - (b) Ordinary Course Professionals
  - (c) Accountants
  - (d) Financial Advisors
  - (e) Valuation Experts
  - (f) Public Relations Specialists
  - (g) Turnaround Specialists
  - (h) Auctioneers

## **V. Planning, Venue and the Start of the Case**

- A. Planning an Exit Strategy
  - 1. The Business Problem
  - 2. Action Steps to Achieve Exit Strategy
  - 3. Uses of the Bankruptcy Laws to Implement Exit Strategy
  - 4. Prepackaged Bankruptcy

B. Venue

C. Let the Game Begin!

1. The Order for Relief
2. Bankruptcy Estate
3. The Automatic Stay
  - (a) General
  - (b) Exceptions
  - (c) Relief from Stay
    - (1) For cause
    - (2) Lack of equity
4. First-Day Orders – Employees and Critical Vendors
5. Reclamation
6. Employee Agreements
  - (a) Pre Plan Confirmation in the Past
  - (b) Recent Legislation
  - (c) Post Confirmation
7. Financing the Chapter 11 Operations
  - (a) Cash Collateral Orders
  - (b) Ordinary Course Debt
  - (c) Debtor in Possession Financing

**VI. Managing the Case**

A. The Lawyers for the Debtor and the Lender

B. Day to Day Operations



1. Stabilizing the Business
2. Suppliers
3. Ordinary Course of Business Transactions
4. Statements and Schedules
5. Interim Operating Reports and Fees
6. Utility Companies
7. Publicly – Held Companies
8. Directors’ and Officers’ Exposure
9. Environmental Claims
10. Unpaid Withholding Taxes
11. Pension Matters
12. Retiree Benefits and Union Contracts
  - (a) Retiree Benefits
  - (b) Union Contracts

C. Day to Day Operations II

1. Sale of Assets
  - (a) Generally
  - (b) Free and Clear
  - (c) Credit Bids
  - (d) Every Sale an Auction Sale
  - (e) Bidding Procedures Motion
    - (1) Break-Up Fees
    - (2) Overbid Protection

- (3) Window Shop Provisions
    - (4) Proof of Financial Ability
    - (5) Other Provisions
  - (f) The Bidding Process
2. The “Strong Arm” Powers – Preferences and Fraudulent Conveyances.
- (a) Preferences
    - (1) Generally
    - (2) Ponzi Schemes
    - (3) Non-Preferential Transfers
    - (4) Defenses to Preference Claims
      - Contemporaneous Exchange for New Value
      - Subsequent New Value
      - Ordinary Course of Business
      - Security Interests in Inventory and Receivables
      - Earmarking
      - Mere Conduit Doctrine
      - Statutory Liens
  - (b) Fraudulent Conveyances
    - (1) Actual Fraud
    - (2) Constructive Fraud
    - (3) Defenses
    - (4) Time
    - (5) Remedies

- (6) Leveraged Buyouts
    - (7) Upstream Guarantees and Liens
    - (8) Out-of-Court Sales
  - (c) Secret Liens
  - (d) Statute of Limitations
  - (e) Creditors Committee
- 3. Executory Contracts and Unexpired Leases
  - (a) Assumption
  - (b) Assignment
  - (c) Rejection
  - (d) Court Approval

## **VII. The Plan of Reorganization**

- A. Introduction.
  - 1. The Concept of Reorganization
  - 2. Defining Success in Reorganization
  - 3. Quantifying the Debts – The Bar Date Order
- B. Step One – The Negotiation Process.
  - 1. Generally
  - 2. Exclusivity
  - 3. Understanding What Constituent Groups Want and Need
    - (a) Secured Creditors
    - (b) Unsecured Creditors

(c) Bondholders

(d) Shareholders

C. Step Two – Drafting the Plan.

1. Types of Exit Strategies
2. Parts of the Plan Document

D. Step Three – The Disclosure Statement.

1. Necessary Components of the Disclosure Statement
2. Disclosure Statement Projections
3. Valuations
4. The Approval Process

E. Step Four – The Solicitation Process.

1. The Solicitation Package
2. Who is Entitled to Vote
  - (a) Allowed Claims
  - (b) Impaired Claims
3. Class Voting
4. Bad Faith Votes
5. Changing Votes
6. The Tabulation Process

F. Step Five – The Plan Confirmation Process.

1. The 12 Requirements for Plan Confirmation
  - (a) Compliance with the Bankruptcy Code
  - (b) Good Faith

- (c) Professional Fees
  - (d) Postconfirmation Officers and Directors
  - (e) Regulatory Approval
  - (f) Best Interests of Creditors Test
  - (g) Consensual Plan
  - (h) Administrative and Priority Claims
  - (i) Prohibition of Total Cramdown Plans
  - (j) Feasibility
  - (k) U.S. Trustee's Fees
  - (l) Retiree Benefits
- 2. Non-voting Equity Securities
- 3. Feasibility
- 4. Cramdown
  - (a) Secured Creditors
  - (b) Unsecured Creditors
  - (c) Equity (Shareholders/Owners)
- 5. Discharge
- 6. Releases
  - (a) Actions Taken in Bankruptcy
  - (b) Pre-Bankruptcy Actions
- G. Step Six – Going Effective
  - 1. Effective Date
  - 2. Legal Effect of Confirmed Plan
  - 3. Channeling Injunctions

## **VIII. Municipal Bankruptcies**

- A. Background
  - 1. Political Context
  - 2. Specific Causes of Bankruptcy
- B. Chapter 9 Eligibility Requirements
  - 1. Municipality
  - 2. Authority
  - 3. Insolvent
  - 4. Plan
  - 5. Four Alternatives
  - 6. Good Faith
- C. Case Administration
- D. Special Revenues
- E. Union Agreements
- F. Pension Plans
- G. Preferences
- H. Plan of Adjustment

## **IX. Miscellaneous**

- A. Post-Confirmation
  - 1. Clean-up Work
  - 2. Plan Defaults
    - (a) Amendment
    - (b) Default Remedies
  - 3. The Final Decree; Time Period for Implementation

- B. Small Business Bankruptcies
- C. Single Asset Real Estate Cases
- D. American Alternatives to Chapter 11 Reorganization Cases
  - 1. Composition of Creditors
  - 2. Out-of-Court Liquidation
  - 3. State Court Receivership
  - 4. Assignment for Benefit of Creditors
- E. Foreign Bankruptcy Proceedings
  - 1. Foreign Proceedings in Poland
  - 2. Polish Proceedings in the U.S.