Contents

Preface xxv Acknowledgments xxvii

Chapter One: Bankruptcy Law: Historical		
Antecedents and Modern Framework	1	
A. Historical Antecedents	2	
B. Modern Framework	3	
1. Sources of Bankruptcy Law	5	
The Bankruptcy Code	5	
The Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms	7	
The Federal Rules of Civil Procedure	8	
The Federal Rules of Evidence	9	
Miscellaneous Provisions of the U.S. Code	9	
State Law	9	
Case Law	10	
2. Bankruptcy Courts	11	
Bankruptcy Court Jurisdiction	11	
Core and Non-Core Proceedings	13	
The Right to a Jury Trial	14	
Constitutional Limits on the Power to Enter Final Judgments	15	
Personal Jurisdiction	15	
Appeal from a Bankruptcy Court Final Order	16	
Contested Matters and Adversary Proceedings	17	
Local Rules, Forms, and Standing Orders	21	
3. Trustees	22	
United States Trustee	22	
Chapter 7 Trustee	23	
Chapter 11 Trustee	24	

xii Contents

4. Professionals Authorized to Be Employed in the Case	24
Attorneys	24
Accountants and Other Professionals	28
Payment of Professionals	28
5. The Chapter 11 Process	29
6. Alternatives to Bankruptcy	30
Chapter Summary	32
Applying the Concepts	33
Chapter Two: Business Entities and Business Debt	35
A. Basic Forms of Business Entities	35
1. Sole Proprietorship	36
2. General Partnership	36
3. Limited Partnership	38
4. Corporations	38
Piercing the Corporate Veil	39
5. Special Purpose Vehicles	40
B. Basic Forms of Business Debt	42
1. Secured Debt	42
Real Property	43
Creation of a Mortgage	44
Assignment of a Mortgage	47
Priority Among Mortgages	48
Mortgage Foreclosure	49
Alternatives to Foreclosure	51
Personal Property	51
The Scope of a Security Interest in Personal Property: The Floating Lien	52
Priority of Security Interests in Personal Property	53
Automatic Perfection of Purchase Money Security Interest (PMSI) in Consumer Goods	56
Perfecting a Security Interest in Titled Vehicles	57
2. Unsecured Debt	57
3. Co-Signers, Guarantors, and Sureties	58
4. Common Forms of Business Debt	59
Bonds	59

	Contents	xiii
Debentures	59	
Notes	60	
Money Market Instruments	60	
Lines of Credit	61	
Leases	61	
Chapter Summary	62	
Applying the Concepts	63	
Chapter Three: Filing Bankruptcy	65	
A. Debtor's Duties	65	
1. The Role of Debtor's Management	65	
Quadrant Structured Products Company, Ltd. v. Vertin	67	
2. Petition and Schedules	74	
Involuntary Petition	75	
Schedules of Assets and Liabilities	77	
Statement of Financial Affairs	77	
B. Affiliated Debtors	78	
1. Venue Selection	78	
2. Joint Administration and Substantive Consolidation	79	
Joint Administration	79	
Substantive Consolidation	80	
In re Owens Corning	81	
Chapter Summary	92	
Applying the Concepts	93	
Chapter Four: The Bankruptcy Estate	95	
A. Scope of Property of the Estate	95	
In re Onio's Italian Restaurant Corp.	99	
B. The Butner Doctrine and Non-Bankruptcy Law	102	
Butner v. United States	103	
C. Turnover	107	
United States v. Whiting Pools, Inc.	109	
Chapter Summary	113	
Applying the Concepts	114	

Chapter Five: The Automatic Stay	117
A. Scope of the Stay	118
1. Exceptions to the Automatic Stay	119
2. Termination of the Stay	121
B. Violation of the Stay	122
C. Relief from Stay	125
1. Section 362(d): Grounds for Relief from Stay	125
In re Henderson	127
2. Temporary Stay of Order Granting Relief from Stay	132
3. Prepetition Waiver of Stay	132
In re Triple A & R Capital Investment, Inc.	134
D. Third-Party Stays	137
Chapter Summary	139
Applying the Concepts	139
Chapter Six: Creditors and Claims	141
A. Claims Process	142
1. Proofs of Claim	142
Proofs of Claim in Chapter 7	143
Proofs of Claim in Chapter 11	147
In re Majestic Holdco, LLC	149
2. Claims Allowance, Objections, and Estimation	153
Claims Allowance	153
Claims Objections	154
Claims Estimation	156
3. Claims Processing in Large Cases	156
Claims Agents	156
Omnibus Objections	157
4. Claims Trading	158
B. Secured Claims	160
1. The Status of a Secured Creditor in Bankruptcy	160
Section 1111(b) Election	161
2. Adequate Protection	162
United Savings Assn. of Texas v. Timbers of Inwood Assocs., Ltd.	l Forest 164
3. Cash Collateral	171

	Contents
C. Unsecured Claims	173
Official Committee of Unsecured Creditors	175
D. Administrative Claims	177
E. Subordination of Claims and Interests	179
Matter of Clark Pipe and Supply Co.	181
Recharacterization	188
Chapter Summary	188
Applying the Concepts	190
Chapter Seven: The Chapter 11 DIP and First Day	
Motions	191
A. Chapter 7 and Chapter 11 Compared	191
B. Filing Chapter 11	193
1. Eligibility to File Chapter 11	193
2. Overview of a Chapter 11 Case	194
3. The Petition, Schedules, and Other Documents	195
C. The Debtor as the Debtor in Possession	196
1. Small Business Debtor	198
2. Single-Asset Real Estate Debtor	199
3. Appointing a Bankruptcy Trustee	199
D. First Day Motions	200
1. Motion for Order Authorizing Use of Cash Collateral	203
Hari Ram, Inc. v. Magnolia Portfolio, LLC (In re Hari Ram, Inc.)	206
2. Motion for Authorization to Pay Prepetition Claims of Critical	
Vendors	213
In re Kmart Corp.	215
3. Other Operational First Day Motions	221
Motion to Authorize Payment of Prepetition Employee	221
Benefits and to Pay Priority Wage Claims	221
Motion to Approve Cash Management System	221 222
4. Administrative First Day Motions Motion for Joint Administration (But Not Substantive	<i>LLL</i>
Consolidation)	222
Motion for Authority to Employ Professionals	222
Motion to Establish Notice and Administrative Procedures	223
Motion for Authority to Retain Noticing and Claims Agent	223

XV

xvi Contents

Motion for Extension of Time to File Schedules, Statement of	
Financial Affairs, [or Other Documents]	223
Motion for Interim Fees Procedures	224
Chapter Summary	224
Applying the Concepts	225
Chapter Eight: Avoiding Prepetition Transfers	227
A. Preferential Transfers	228
1. Preference Claims	229
Preference Recovery Process	230
2. Preference Defenses	232
Contemporaneous Exchange for New Value	232
Ordinary Course Defense	233
New Value Defense	235
Burtch v. Revchem Composites, Inc. (In re Sierra Concrete Design, Inc.)	238
Other Preference Defenses	241
B. Fraudulent Transfers	245
1. Avoiding Fraudulent Transfer Under §548	246
Citicorp North America, Inc. v. Official Committee of Unsecured Creditors (In re TOUSA, Inc.)	248
2. Avoiding Fraudulent Transfer Under §544(b)	259
C. The Trustee's Strong Arm Avoidance Powers	260
1. Section 544(a)(1) — Hypothetical Judgment Lien Creditor	260
2. Section 544(a)(3) — Hypothetical Bona Fide Purchaser of	260
Real Property 3. Knowledge of the Trustee	261
Kohut v. Quicken Loans, Inc. (In re Wohlfeil)	262
D. Setoff	266
Improvement in Position Test	269
Citizens Bank of Maryland v. Strumpf	209 270
2. Setoff vs. Recoupment	270
Postpetition Transfers	273
-	274
Chapter Summary	
Applying the Concepts	275

	Contents
Chapter Nine: Executory Contracts and Unexpired Leases	277
A. Section 365	277
1. The Meaning of "Executory Contracts"	279
2. Assumption and Rejection	281
In re Old Carco, LLC	283
Timing of the Motion to Assume or Reject	291
Consequences of Rejection by the DIP	292
Assuming a Contract on Which the Debtor Is in Default	293
3. Assignment of Contract Rights	294
4. Special Issues Under §365	296
Contracts That Cannot Be Rejected	297
Rejection of Collective Bargaining Agreements and Retire Benefits	ee 297
Intellectual Property Contracts	300
Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, I (In re Richmond Metal Finishers, Inc.)	Inc. 302
Rejection of Trademark Licenses	308
B. Key Employee Retention and Incentive Programs	308
1. Overview of KERPs and KEIPs	308
2. KERPS	309
3. KEIPs	310
Chapter Summary	311
Applying the Concepts	312
Chapter Ten: Operating the DIP: Section 363 Sales	
and Debtor in Possession Financing	315
A. Sales Other Than in the Ordinary Course	315
1. Section 363 Sale Process	317
2. The Role of Adequate Protection in Connection with a §363 Motion	Sale 321
3. The Role of the Automatic Stay in Connection with a §363 Sale Motion	322
4. Credit Bidding	323
In re Fisker Automotive Holdings, Inc.	325

5. Sales Free and Clear

6. The Effect of Reversal or Modification of a §363 Sale

xvii

332

334

xviii Contents

B. Debtor in Possession Financing	335
 Postpetition Unsecured Debt Incurred in the Ordinary Course of Business 	336
2. Postpetition Unsecured Debt Incurred in Other Than the	
Ordinary Course of Business	336
3. Postpetition Secured Debt	337
In re Campbell Sod, Inc.	339
The Effect of Reversal or Modification of an Order Authorizing Postpetition Debt	345
Cross-Collateralization	346
Roll-Ups	347
Chapter Summary	348
Applying the Concepts	349
Chapter Eleven: The Chapter 11 Plan: Plan Proposal and Contents	351
1 Toposal and contents	331
A. Plan Proposal — Exclusivity and Time Limitations	352
B. Classification of Claims and Interests	353
C. Plan Contents — Sample Plan Overview	355
Article I — Definition and Construction of Terms	356
Article II — Classification of Claims and Interests	356
Article III — Treatment of Claims and Interests	357
Article IV — Means for Implementing the Plan	357
Article V — Distributions	358
Article VI — Procedures for Resolving Disputed Claims	358
Article VII — Executory Contracts and Leases	358
Article VIII — Conditions Precedent to Effective Date	358
Article IX — Effect of Confirmation	358
Article X — Retention of Jurisdiction	359
Article XI — Miscellaneous Provisions	359
D. Impaired Classes and Their Treatment	359
E. Gerrymandering Claims	360
Boston Post Road LP v. FDIC (In re Boston Post Road LP)	362
F. Modification of Secured Claims	369
G. Amending the Plan	371
Chapter Summary	372
Applying the Concepts	

Contents	xix

Chapter Twelve: The Chapter 11 Plan: Plan Confirmation	
A. Disclosure Statement	376
B. Plan Solicitation and Voting	378
Designation of Claims or Interests for Voting	379
In re Indianapolis Downs, LLC	381
C. The Chapter 11 Plan	389
1. Section 1129(a) Consensual Confirmation	389
Approval of the Plan by All Classes [\$1129(a)(8)]	389
Approval by at Least One Impaired Class [\$1129(a)(10)]	389
The Best Interests Test [§1129(a)(7)]	390
The Feasibility Test [§1129(a)(11)]	390
The Lawfulness and Good Faith Tests [\$1129(a)(1), (2),	and (3)] 390
Treatment of §507 Priority Claims [§1129(a)(9)]	391
2. Section 1129(b) Cramdown	391
Approval by One Impaired Class	392
The No Unfair Discrimination Requirement of \$1129(b))(1) 392
The Fair and Equitable Requirement of §1129(b)(1) and as to Secured Claims	393
Cramdown Interest Rates	394
Indubitable Equivalent, or Dirt for Debt	397
The Fair and Equitable Requirement of §1129(b)(1) and as to Unsecured Claims — The Absolute Priority Rule	
The New Value Exception	400
Bank of America National Trust & Savings Association v. 203 N. LaSalle Street Partnership	ı 401
Class Gifting and the Absolute Priority Rule	412
Enforcement of Prepetition Intercreditor Agreements	414
3. Order Confirming Plan	415
Non-Debtor Releases	416
Post-Confirmation Modification of a Chapter 11 Plan	418
Res Judicata Effect of Plan Confirmation	418
Chapter Summary	420
Applying the Concepts	421
Chapter Thirteen: Evolving Forms of Chapter 11	423
A. Section 363(b) Liquidation of Substantially All Assets	424
1 Special Considerations for High Dollar Value §363(b) Sales	s 425

	2. Noncash Components of a Bid	427
	3. Sub Rosa Bankruptcy	429
	In re GSC, Inc.	431
B.	Pre-Packs and Pre-Negotiated Bankruptcies	441
C.	Structured Dismissals	444
	Official Committee of Unsecured Creditors v. CIT Group Business Credit, Inc. (In re Jevic Holding Corp.)	446
D.	Auto Industry Bankruptcies: Chrysler and General Motors	456
	In re Chrysler, LLC	458
E.	Mass Tort Bankruptcies	466
Ch	apter Summary	471
Ар	plying the Concepts	471
Ch	napter Fourteen: Cross-Border Insolvency Under	
	e Bankruptcy Code	475
A.	UNCITRAL Model Law on Cross-Border Insolvency	476
B.	Bankruptcy Code Chapter 15	477
	1. Chapter 15 Purpose and Overview	477
	2. Commencing a Chapter 15 Bankruptcy Case	479
	3. Eligibility and Venue	480
	4. Main and Nonmain Proceedings, and the Importance of COMI	480
	5. Comity and Limitations on the Powers of Foreign Representatives	481
Ch	apter Summary	482
Аp	plying the Concepts	483
Ch	napter Fifteen: Bankruptcy Jurisdiction	485
Α.	Core and Non-Core Proceedings	486
	1. Core Proceedings — 11 U.S.C. §157(b)	486
	2. Non-Core Proceedings	487
В.	Additional Limitations on Jurisdiction —Abstention and Withdrawal of the Reference	487
	1. Abstention	487
	2. Permissive Abstention (Also Referred to as "Discretionary	
	Abstention")	488
	3. Mandatory Abstention	488
	1 Withdrawal of the Deference	190

	Contents	xxi
C. Special Problems of Bankruptcy Jurisdiction	489	
1. Right to Jury Trial in a Core Proceeding	490	
2. Core Matter Jurisdiction Revisited: Stern v. Marshall	490	
3. Stern Claims	492	
Adjudicating Stern Claims	492	
Consent to Non-Core Adjudication	493	
Wellness International Network, Ltd. v. Sharif	494	
D. Procedural Responses to Stern v. Marshall and Its Progeny	502	
Chapter Summary	504	
Applying the Concepts	504	
Appendix A: Official Form 201: Voluntary Petition for Non-Individuals		
Filing for Bankruptcy	507	
Appendix B: Official Form 309F: Notice of Chapter 11 Bankruptcy Case	529	
Appendix C: United States Bankruptcy Court for the Western District Of		
Pennsylvania Form 13	531	
Appendix D: UNCITRAL Model Law on Cross-Border Insolvency	553	

Glossary 567
Table of Cases 593

Index 601