BANKRUPTCY BASICS FOR CREDITORS

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Bankruptcy Chapters

Odd Chapters

- Chapter 9 – Municipality
- Chapter 12 – Family Farmer (including rancher, fisherman)
- Chapter 15 – Ancillary and Cross-Border Cases

Chapter 11

- Expensive and complicated
- Business or individuals eligible
- Individual payment must include amount of 5 years net disposable income
- Enhanced financial reporting including monthly operating reports
- Disclosure Statement and Plan with creditor vote

Subchapter V of Chapter 11

- Maximum (non insider) debt (including amounts owed by affiliates) $7,500,000
- Business income and not primarily from single asset real estate
- Debtor must file a plan within 90 days
- Need not have accepting class
- Must pay 3 years projected net operating income through plan

Single Asset Real Estate Debtor
Estate Debtor

- 11 USC §101(51B)-The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.
- 11 U.S.C. 1182(1)(A) excludes from definition of a "debtor" in a small business reorganization "a person whose primary activity is the business of owning single asset real estate", and in Section 362

Requirements to Retain Automatic Stay-SARE

- 11 U.S.C. 362(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
- (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later-
  - (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
  - (B) the debtor has commenced monthly payments that-
    - (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
    - (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

Chapter 13

- Chapter 13 – repayment plan for individuals with regular income
  - While there is a Chapter 13 Trustee, the Debtor remains in possession of assets
  - The plan must include 5 years of net disposable income
  - No voting on the plan
  - Debt limits
  - Super discharge

Chapter 7

- Straight liquidation
- Trustee appointed to collect non-exempt assets and distribute to creditors according to priority
- Business or individual may file
- Can’t be a Debtor-Insurance Company, Bank, S&L, Railroad

Adversary Proceedings

- A bankruptcy adversary proceeding is equivalent to ordinary litigation
- Same process – complaint, answer, initial case conference/disclosures; discovery
- Most of the Federal Rules of Civil Procedure Apply – see FRBP 7001 *et. seq.*
- *Examples: Objection to discharge, preference or fraudulent conveyance action, determination of validity or priority of liens*

B9F (Official Form 9F) (Chapter 11 Corporation/Partnership Case) (12/12) Case Number **13-**[redacted]

UNITED STATES BANKRUPTCY COURT District of Nevada

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on 11/29/13.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. Case documents may be viewed at www.nvb.uscourts.gov.

Important Notice to Individual Debtors: Debtors who are individuals must provide government−issued photo identification and proof of social security number at the meeting of creditors. Failure to do so may result in dismissal of their case.

Creditors −− Do not file this notice in connection with any proof of claim you submit to the court.
See Reverse Side For Important Explanations

Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):
[redacted]

Case Number: 13-[redacted] Judge: [redacted]	Social Security / Individual Taxpayer ID / Employer Tax ID / Other nos: [redacted]
Attorney for Debtor(s) (name and address): [redacted] Telephone number: [redacted]	

Meeting of Creditors

Date: **January [redacted] 2014** Time: [redacted]
Location: **300 Las Vegas Blvd., South, Room 1500, Las Vegas, NV 89101**

Deadline to File a Proof of Claim

Proof of claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): **90 days after the date first set for the meeting of creditors**

For a governmental unit: **180 days after order for relief entered**

Creditor with a Foreign Address:

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: 300 Las Vegas Blvd., South Las Vegas, NV 89101 Telephone number: (702) 527−7000	**For the Court:** Clerk of the Bankruptcy Court: Mary A Schott Mary A. Schott
Hours Open: Monday − Friday 9:00 AM − 4:00 PM	Date: [redacted]

Initial Notice Includes

- Date of filing
- Case number (including judge initials)
- Debtor's counsel contact
- Date of 341 meeting
- May include bar date for filing claims
  - If appears to be no asset, notice will state claims need not be filed, such that filing claims is optional

Obtaining Information

- Court's website
- Schedules and Statements
- Monthly Operating Reports (Ch. 11)
- First Meeting of Creditors (341 Meeting)
- 2004 Examination

Important Deadlines

- Objections to exemptions – 30 days after the meeting of creditors is concluded.
- Complaint to object to a discharge – 60 days after the ***first date set*** for the first meeting of creditors
- Filing claims – generally 180 days from the filing of the petition.

Claims

- Filing of claim may be deemed consent to jurisdiction
- Properly filed claim is prima facie evidence of validity and amount
- Include calculation, writing which is basis for claim, special rules for consumer mortgages
- Generally any creditor may object to claim
- Claims objection may be by motion or adversary
- If objection pending, claim not deemed allowed until determined; court may allow for purpose of plan voting and may estimate amount
- Deadlines for filing claims, filing rejection claims after contract rejected, filing administrative claims

Reclamation

- Delivery of goods within 45 days prior to the commencement
- Sold in the ordinary course
- Received while the debtor was insolvent
- Demand for reclamation within 45 days of delivery (or, if the bankruptcy filed during that period, within 20 days after the commencement of the case)
- 503(b)(9) grants priority to claims for the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.
- PACA claims preserved in bankruptcy

Creditor's Committees

- Standing to be heard
- May hire counsel and other professionals to be paid by the estate
- May recommend acceptance or rejection of the Plan

Cash Collateral

- Debtor may use cash collateral only with court approval or consent of the secured creditor
- Otherwise must segregate and account for cash collateral
- Notice requirements for motion, stipulation
- Proceeds generally subject to prepetition interest; court may adjust for good cause

Sales and Credit Bid Rights

- Debtor can use, sale or lease property in the ordinary course
- With court approval, outside the ordinary course
- Generally must permit credit bids
- Sales free and clear of liens if:
  - Pay in full
  - Consent
  - Bona fide dispute
  - Permitted under applicable non-bankruptcy law
  - Required to provide adequate protection if requested
- Sale of joint tenant interest
- Good faith finding

Executory Contracts

- Executory contract = performance due on both sides
- Generally can assume and assign if cure defaults and give adequate assurance of future performance
- Cannot assume financing/financial accommodation contracts or personal services contracts without approval of other party
- Special rules for union contracts, leases

Objections to Discharge

- Grounds for objection to discharge are set forth in 11 U.S.C. §§ 523 and 727 and may include debts obtained by fraud, defalcation by a fiduciary, and injuries caused while under the influence.
- Marital and support obligations are generally excepted from discharge without the necessity of filing a complaint.

What is the Automatic Stay

- “Automatic” – an injunction for the price of a filing fee
- Generally prohibits any action against the Debtor or against property of the estate
- Actions taken in violation of the automatic stay are void
- Penalties for knowing violations
- Although set off rights preserved in bankruptcy, exercise requires relief from stay

Stay Does Not Apply to

- The commencement or continuation of a civil action or proceeding
  - UCC Continuation
  - Government or regulatory actions
  - Tax audits and assessments and setoff of tax refunds
  - Most domestic support, divorce, custody and paternity proceedings
  - Notice of perfection (546(b)) such as mechanic's lien

Relief From Stay

- For cause
- Including lack of adequate protection
- Property not necessary to an effective reorganization and debtor lacks equity in the property
- Single asset real estate case-failure to either commence interest payments or propose plan with reasonable likelihood of success within 90 days

Abstention

- The district court may, in the interest of justice or in the interest of comity with State courts of respect for State law, abstain from hearing a particular proceeding arising under the Bankruptcy Code or related to a bankruptcy case
  - 28 U.S.C. §1334

Abstention – Factors Considered

- The extent to which state law issues predominate over bankruptcy issues
- Difficulty or unsettled nature of the applicable law
- Presence of related proceeding in non-Bankruptcy Court
- Substance rather than form of an asserted core proceeding
- Feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the Bankruptcy Court; and
- Likelihood of forum shopping

Arbitration

- Bankruptcy court may grant relief from stay to proceed with arbitration
- Bankruptcy Court must enforce valid arbitration agreements and compel the arbitration of non-core state law contract claims, with discretion to enforce arbitration clauses in core proceedings. In re Lucas, 321 B.R. 407, 409-10 (Bankr. D. Nev. 2004); In re Gurga, 176 B.R. 196, 198-200 (9th Cir. BAP 1994).

Objection to Dischargeability/Discharge

- 523 certain debts
- For money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition
- Use of a statement in writing that is materially false; respecting the debtor's or an insider's financial condition; creditor reasonably relied, made with the intent to deceive

Objection to Dischargeability/Discharge

- Consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the bankruptcy
- Consumer cash advances aggregating more than $750 obtained by an individual debtor on or within 70 days before the bankruptcy
- For fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny
- Willful or malicious injury or DUI

727 Objection to Debtor's Discharge, grounds include:

- The debtor, with intent to hinder, delay, or defraud, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed property within one year before, or after, the date of the filing of the petition
- The debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless justified under all of the circumstances of the case

727 Objection to Debtor's Discharge, grounds include:

- The debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account; presented or used a false claim; gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or withheld recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
- The debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

727 Objection to Debtor's Discharge, grounds include:

- The debtor has refused, in the case, to obey any lawful order of the court, other than an order to respond to a material question or to testify;
- On the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked

Appointment of Trustee or Examiner

- Trustee –
    1. for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
    2. if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.
- Examiner – if more than $5 million in debt or in the interest of creditors

Conversion or Dismissal

- Court will convert or dismiss, whichever is in the best interest of the creditors and the estate, for cause, including:
  - substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
  - gross mismanagement of the estate;
  - failure to maintain appropriate insurance that poses a risk to the estate or to the public;
  - unauthorized use of cash collateral substantially harmful to one or more creditors;
  - failure to comply with an order of the court, reporting requirements, meetings or examinations, fees
  - failure timely to pay post-petition taxes or to file post-petition tax returns;
  - failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by the Bankruptcy Code or the court

Preferences

- Goal of bankruptcy is to divide assets for pro rata distribution to creditors based on priority
- Payments within 90 days of filing (1 year to insider) may improperly prefer a creditor who in fairness should give the money back and participate in the pro rata distribution

What is a Preference?

- A transfer
- Of an interest of the debtor in property
- To or for the benefit of a creditor
- For or on account of an antecedent debt
- Made while the debtor was insolvent, (6) on or within 90 days (one year for “insiders”) before bankruptcy
- That enables the creditor to receive more than it would receive in a Chapter 7 case if the transfer had not been made

Common Defenses

- Contemporaneous exchange
- Ordinary course of business
- Subsequent new value
- Statutory lien
- Exception for transfers under $600 in consumer cases
- Transfers under $5,000 in non-consumer cases
- Venue is non-insider Defendant's residence up to $10,000 ($15,000 consumer)

Contemporaneous Exchange

A. Intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

B. In fact a substantially contemporaneous exchange

Ordinary Course of Business

- Trustee may not avoid a transfer –
- To the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –
  A. Made in the ordinary course of business or financial affairs of the debtor and the transferee; or
  B. Made according to ordinary business terms

Subsequent New Value

- Trustee can not avoid a transfer –
- To or for the benefit of a creditor
- To the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –
  A. Not secured by an otherwise unavoidable security interest; and
  B. On account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor

Fraudulent Transfers

- Transfer within 2 years
  - With the actual intent to hinder, delay or defraud or
  - Not for reasonably equivalent value; debtor was or became insolvent
- Transfer within 10 years prior to bankruptcy to self settled trust of which debtor is beneficiary made with actual intent to hinder delay or defraud creditors (including future creditors)
- Trustee also has the ability to avoid state law fraudulent transfers

Things You Can Do When Your Customer Files Bankruptcy

- Obtain information
- File claim
- Serve on creditor's committee
- Exercise reclamation rights
- Preserve interest in cash collateral/after acquired property
- Protect credit bid rights/security interests
- Require adequate protection/consider relief from stay
- In appropriate cases, consider trustee/examiner/conversion
- In appropriate cases, consider objection to discharge/dischargeability
- Negotiate

Back to the Beginning: Pre-Bankruptcy Strategies and Considerations

Be Secured

- Requirements:
  - Signed security agreement (or authenticated by electronic signature)
  - Description of collateral
  - Perfection
    - UCC-1 filed in borrower's state of incorporation
    - Possession
    - Assignment of a single account

Be Guarantied

- Must be in writing
- Can be collateralized
- Limited
- Joint and Several
- “Bad boy” guaranties

Be Aware

- Require (and review) financial statements; verifications as to collateral base; tax returns
- Watch for judgments or defaults
- Take payments from borrower, payment from non obligated entities may expand fraudulent transfer liability
- BUT don’t hesitate to take payment that “may be” a preference

Be Proactive

- Reclamation/set off rights
- COD
- Prejudgment relief
- Record interest where appropriate
- File UCC’s and continuation statements

Questions? Comments?

Thank you!

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