

ST. JOHN'S UNIVERSITY
SCHOOL OF LAW
LL.M. IN BANKRUPTCY PROGRAM

BANKRUPTCY DRAFTING

Fall 2008
Professor Alec Ostrow

Wednesdays: 7:30 p.m. to 9:20 p.m.
Manhattan Campus

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Course Syllabus

This course is divided into three main topics, which will be considered in the order in which they typically arise in a chapter 11 case:

- I. Estate Financing (cash collateral financing and debtor in possession loans) (classes 1-5)
- II. Sales of Assets (including assumption and assignments of executory contracts and unexpired leases) (classes 6-9)
- III. Plan Confirmation (plans and disclosure statements) (classes 10-14)

There is no required book for this course. Model agreements, plans and disclosure statements will disseminated in class, and, if possible, via e-mail. I have asked that the following treatises be placed on reserve:

For use during the first part on estate financing:

Robert J. Rosenberg & Lawrence P. King, Collier Lending Institutions and the Bankruptcy Code (Matthew Bender).

Raymond T. Nimmer, Commercial Asset-Based Financing (vol. 1-4) (West - CBC).

For use during the second part on sales of assets:

John Collen, Buying and Selling Real Estate in Bankruptcy (West).

Richard Tilton, Bankruptcy Business Acquisitions 2d Ed. (ABI).

For use during the third part on plan confirmation:

John K. Pearson, Robert E. Nugent & Mary Patricia Hesse, Drafting Bankruptcy Reorganization Plans (vol. 1-3 & cum. supp.) (Wiley - Aspen).

Use of hypotheticals and role-playing:

During the course, at least one hypothetical will be developed and refined, for use in class discussion and drafting assignments. A company seeking reorganization under chapter 11 will have its principal business assets subject to pre-petition liens, thus requiring immediate court-approved estate financing, either through use of cash collateral, or through new debtor in possession borrowings. During the course of the bankruptcy case, the company will require the sale of real property, and the sale of a non-core subsidiary or division. Finally, the company will seek to emerge from chapter 11, with its debt restructured, by proposing a plan, seeking approval of a disclosure statement to accompany the plan, and obtaining confirmation of the plan.

Because document drafting involves the resolution of competing interests, students will be asked from time to time to assume the roles of debtor, unsecured creditors' committee, secured lender, asset purchaser, and plan funder. Drafts of documents prepared by students or introduced as examples will be revised or critiqued from the point of view of the role assigned.

I. Estate Financing

Authorities to be familiar (or at least acquainted) with:

U.C.C. art. 9

11 U.S.C. §§ 361, 362, 363, 364, 503(b), 506, 507(b), 541, 552 (both pre- and post-2005 amendments where applicable)

Hartford Underwriters Ins. Co. v. Union Planters Nat'l Bank, 530 U.S. 1 (2000)

Otte v. Manufacturers Hanover Commercial Corp. (In re Texlon Corp.), 596 F.2d 1092 (2d Cir. 1979)

General Elec. Credit Corp. v. Levin & Weintraub (In re Flagstaff Foodservice Corp.), 739 F.2d 73 (2d Cir. 1984)

Owens Corning Fiberglass Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.), 759 F.2d 1440 (9th Cir. 1985)

Bray v. Shenandoah Federal Sav. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085 (4th Cir. 1986)

Burchinal v. Central Wash. Bank (In re Adam's Apple, Inc.), 829 F.2d 1484 (9th Cir. 1987)

Sapir v. CPQ Colorchrome Corp. (In re Photo Promotion Assos., Inc.), 881 F.2d 6 (2d Cir. 1989)

Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.), 963 F.2d 1490 (11th Cir. 1992)

Vienna Park Properties v. United Postal Sav. Ass'n (In re Vienna Park Properties), 976 F.2d 106 (2d Cir. 1992)

RTC v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552 (3d Cir. 1994)

Jason Realty, L.P. v. First Fidelity Bank (In re Jason Realty, L.P.), 59 F.3d 423 (3d Cir. 1995)

BII, Inc. v. Chapter 7 Trustee (In re IBI Security Serv., Inc.), 133 F.2d 205 (2d Cir. 1998)

Harvis Trien & Beck, P.C. v. Federal Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.), 153 F.3d 61 (2d Cir. 1998)

Clyde Bergmann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.), 250 F.3d 955 (10th Cir. 2001)

In re American Kitchen Foods, Inc., 2 Bankr. Ct. Dec. 715 (Bankr. D. Me. 1976)

In re Roblin Indus., Inc., 52 B.R. 241 (Bankr. W.D.N.Y. 1985)

In re Ames Dep't Stores, Inc., 115 B.R. 34 (Bankr. S.D.N.Y. 1990)

In re Western Pacific Airlines, Inc., 223 B.R. 567 (Bankr. D. Colo. 1997)

In re Stony Creek Technologies, LLC, 364 B.R. 882 (Bankr. E.D. Pa. 2007)

The first class will begin with an introduction to issues related to document drafting in general, and secured financing documents in particular. The discussion will focus on bankruptcy issues of adequate protection, superpriorities, priming liens, carve-outs, cross-collateralization, post-petition lien enforcement and pre-petition lien protections. The focus will

then be on cash collateral agreements. Then debtor in possession loan agreements will be taken up.

II. Sales of Assets

Authorities to be familiar (or at least acquainted) with:

11 U.S.C. §§ 332, 363(b), 363(e)-(o), 365 (both pre- and post-2005 amendments where applicable)

Control Data Corp. v. Zelman (In re Minges), 602 F.2d 38 (2d Cir. 1979)

Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063 (2d Cir. 1983)

Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989)

Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026 (1994)

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994)

Lone Star Indus., Inc. v. Compania Naviera Perez Compac SACFIMFA (In re New York Trap Rock Corp.), 42 F.3d 747 (2d Cir. 1994)

Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997)

Kabro Assocs. of West Islip LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F.3d 269 (2d Cir. 1997)

Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380 (2d Cir. 1997)

Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.), 165 F.3d 747 (9th Cir. 1998)

Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527 (3d Cir. 1999)

Crow Winthrop Dev. Limited Partnership v. Jamboree LLC (In re Crow Withrop Operating Partnership), 241 F.3d 1121 (9th Cir. 2001)

Pearson v. Component Technology Corp., 247 F.3d 471 (3d Cir. 2001)

Cinicola v. Scharffenberger, 248 F.3d 110 (3d Cir. 2001)

In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003)

Precision Indus., Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537 (7th Cir. 2003)

Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.), 440 F.3d 238 (5th Cir. 2006)

Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.), 147 B.R. 650 (S.D.N.Y. 1992), appeal dismissed, 3 F.3d 49 (2d Cir. 1993)

In re Golden Books Family Entertainment, Inc., 269 B.R. 300 and 311 (D. Del. 2001) (two cases)

In re U.L. Radio Corp., 19 B.R. 537 (Bankr. S.D.N.Y. 1982)

Rockland Center Assocs. v. TSW Stores of Nanuet, Inc. (In re TSW Stores of Nanuet, Inc.), 34 B.R. 299 (Bankr. S.D.N.Y. 1983)

In re America West Airlines, Inc., 166 B.R. 908 (Bankr. D. Ariz. 1994)

In re APP Plus, Inc., 223 B.R. 870 (Bankr. E.D.N.Y. 1998)

In re Teligent, Inc., 268 B.R. 723 (Bankr. S.D.N.Y. 2001)

In re Footstar, Inc., 323 B.R. 566 (Bankr. S.D.N.Y. 2005)

In re Adelphia Communications Corp., 359 B.R. 65 (Bankr. S.D.N.Y. 2007)

The discussion will focus on bankruptcy issues in asset sales, including sales free and clear of liens and other interests, successor liability issues, auction process and bidder protections, protection of good faith buyers, and the assumption and assignment of executory contracts and unexpired leases. The first half of this segment will focus on drafting documents involving sales of real property, and assumption and assignment of real property leases. The second half will focus on drafting documents involving sales of business subsidiaries or divisions.

III. Plan Confirmation

Authorities to be familiar (or at least acquainted) with:

11 U.S.C. §§ 524(a), 524(e), 524(g)-(h), 1111(b), 1121-1146 (both pre- and post-2005 amendments, where applicable)

Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939)

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988)

United States v. Energy Resources Co., 495 U.S. 545 (1990)

Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997)

Bank of America Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 526 U.S. 434 (1999)

Till v. SCS Credit Corp., 124 S. Ct. 1951 (2004)

Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.), 836 F.2d 1263 (10th Cir. 1988)

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir.), cert. denied, 488 U.S. 868 (1988)

Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988)

Century Glove, Inc. v. First Am. Bank, 860 F.2d 964 (3d Cir. 1988)

American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989)

Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.), 886 F.2d 859 (7th Cir. 1989)

Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990)

Sure-Snap Corp. v. State Street Bank & Tr., 948 F.2d 869 (2d Cir. 1991)

Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991), cert. denied, 506 U.S. 821 (1992)

Great Western Bank v. Sierra Woods Group, 953 F.2d 1174 (9th Cir. 1992)

SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 960 F.2d 285 (2d Cir.), cert. dismissed, 506 U.S. 1088 (1993)

Official Comm. of LTV Aerospace & Defense Co. v. Official Comm. of LTV Steel Co. (In re Chateaugay Corp.), 988 F.2d 322 (2d Cir. 1993)

L&J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc. (In re L&J Anaheim Assocs.), 995 F.2d 940 (9th Cir. 1993)

Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (In re Bonner Mall Partnership), 2 F.3d 899 (9th Cir. 1993), cert. dismissed and mot. to vacate denied, 513 U.S. 118 (1994)

In re Specialty Equip. Cos., 3 F.3d 1043 (7th Cir. 1993)

Windsor on the River Assocs. v. Balcor Real Estate Fin. Inc. (In re Windsor on the River Assocs.), 7 F.3d 127 (8th Cir. 1993)

Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.), 10 F.3d 944 (2d Cir. 1993)

In re Woodbrook Assocs., 19 F.3d 312 (7th Cir. 1994)

Boston Post Road Ltd. v. FDIC (In re Boston Post Road Ltd.), 21 F.3d 447 (2d Cir. 1994), cert. denied, 513 U.S. 1109 (1995)

Mutual Ben. Life Ins. Co. v. 680 Fifth Ave. Assocs. (In re 680 Fifth Ave. Assocs.), 29 F.2d 95 (2d Cir. 1994)

Momentum Mfg. Corp. v. Employee Creditors' Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132 (2d Cir. 1994)

In re Penrod, 50 F.3d 459 (7th Cir. 1995)

Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir. 1995)

Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415 (9th Cir. 1996), cert. denied, 519 U.S. 1054 (1997)

Aetna Cas. & Sur. Co. v. Clerk, U.S. Bankruptcy Court (In re Chateaugay Corp.), 89 F.3d 942 (2d Cir. 1996)

(1997) In re Continental Airlines, 91 F.3d 553 (3d Cir. 1996), cert. denied, 519 U.S. 1057

1997) General Motors Acceptance Corp. v. Valenti (In re Valenti), 105 F.3d 55 (2d Cir.

Coltex Loop Central Three Partners v. BT/SAP Pool Assoc. (In re Coltex), 138 F.3d 39 (2d Cir. 1998)

Key Bank v. Milham (In re Milham), 141 F.3d 420 (2d Cir. 1998)

Danny Thomas Properties II Ltd. Partnership v. Beal Bank (In re Danny Thomas Properties II Ltd. Partnership), 241 F.3d 959 (8th Cir. 2001)

Northwest Village Ltd. Partnership v. Franke (In re Westpointe, L.P.), 241 F.3d 1005 (8th Cir. 2001)

Class 5 Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002)

MAC Panel Co. v. Virginia Panel Corp., 283 F.3d 622 (4th Cir. 2002)

Deutsche Bank, AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136 (2d Cir. 2005)

In re Armstrong World Indus., Inc., 432 F.3d 507 (3d Cir. 2005)

Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating, LLC), 478 F.3d 452 (2d Cir. 2007)

Trans World Airlines, Inc. v. Texaco, Inc. (In re Texaco, Inc.), 81 B.R. 813 (Bankr. S.D.N.Y. 1988)

City of New York v. Baldwin League of Indep. Schools (In re Baldwin League of Indep. Schools), 110 B.R. 125 (S.D.N.Y. 1990)

Doral Center, Inc. v. Ionosphere Clubs, Inc. (In re Ionosphere Clubs, Inc.), 208 B.R. 812 (S.D.N.Y. 1997)

Tracar, S.A. v. Silverman (In re American Preferred Prescription, Inc.), 266 B.R. 273 (E.D.N.Y. 2001)

In re Scioto Valley Mortgage Co., 88 B.R. 168 (Bankr. S.D. Ohio 1988)

In re American Solar King Corp., 90 B.R. 808 (Bankr. N.D. Tex. 1988)

In re Friese, 103 B.R. 90 (Bankr. S.D.N.Y. 1989)

In re Allegheny Int'l, Inc., 118 B.R. 282 (Bankr. W.D. Pa. 1990)

In re Southland Corp., 124 B.R. 211 (Bankr. N.D. Tex. 1991)

In re New Valley Corp., 168 B.R. 73 (Bankr. D.N.J. 1994)

In re Cellular Info. Systems, Inc., 171 B.R. 926 (Bankr. S.D.N.Y. 1994)

CFC 78 Partnership B v. Casa Loma Assocs. (In re Casa Loma Assocs.), 122 B.R. 814 (Bankr. N.D. Ga. 1991)

In re Poplar Run Five Ltd. Partnership, 192 B.R. 848 (Bankr. E.D. Va. 1995)

AMRESKO New England II, L.P. v. Vescio (In re Vescio), 227 B.R. 352 (Bankr. D. Vt. 1998)

In re Holly Garden Apartments, Ltd., 238 B.R. 488 (Bankr. M.D. Fla. 1999)

In re Genesis Health Ventures, Inc., 266 B.R. 591 (Bankr. D. Del. 2001)

In re Exide Technologies, 303 B.R. 48 (Bankr. D. Del. 2003)

Kenneth N. Klee, All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code, 53 Am. Bankr. L.J. 133 (1979)

The discussion will focus on types of plans, contents of plans and disclosure statements, classification, requirements of confirmation, cramdown, third-party releases, channeling injunctions, modifications, and chapter 22. This segment will begin with the basic contents of plans and disclosure statements. The remaining classes will focus on drafting different kinds of plans and special plan provisions. Plans and disclosure statements will be considered in tandem.

Grades

Grades will be based on two drafting assignments, an in-class final examination, and class participation. The first drafting assignment will be given at the conclusion of the segment on estate financing, and will count for 20% of the grade. The second drafting assignment will be given at the conclusion of the segment on sales of assets, and will count for 30% of the grade. Two weeks will be allowed for each assignment. The final examination, which will be an in-class multiple choice exam, open Bankruptcy Code and Rules and class

notes, will count for 45% of the grade. Although the final exam will cover the entire course, it will be more heavily weighted to the plan confirmation segment. Good class participation (often and thoughtful, not requiring the correct answer, if one exists) will count for 5% of the grade.