



Joint Business Law/Bankruptcy Law Section MCLE Program Webinar September 16, 2020

12:00 PM – 1:00 PM

Welcome/Announcements and Introduction

Oran Cart – Business Law and Practice Section Chair

Bankruptcy and Workouts for General Business Lawyers

Speaker

Barbara Yong, Golan Christie Taglia LLP

Speaker Bio – see attached

Presentation Summary

Small business owners need to assess the viability of their business and, if unable to become profitable, consider closing the doors to avoid personal liability. We will review the bankruptcy and non-bankruptcy options available to small businesses to wind down their affairs, including the newly enacted Subchapter V Small Business Reorganization Act (SBRA). Congress created the SBRA to streamline the Chapter 11 process for small businesses.

Link to Evaluation

The evaluation must be completed in order to receive CLE credit.

<https://www.surveymonkey.com/r/BusBank09162020>

Next Meeting:

Business Law: October 13, 2020 – IP for Business Lawyers, Brie Crawford, Laura Liss and Alissa Verson

Bankruptcy Law: December 14, 2020 – The program will cover the automatic stay from a creditor’s perspective and recent case law on



dischargeability of student loans.

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Barbara L. Yong is a partner with the law firm of Golan Christie Taglia LLP. She has been practicing for over 35 years, the last 25 of which have focused on commercial litigation, reorganization, and bankruptcy. Barbara counsels individuals and businesses in financial difficulty and represents both debtors and creditors in chapters 7, 11, 12 and 13. Barbara graduated from Loyola University School of Law in 1982 and received her undergraduate degree from the University of Illinois at Urbana-Champaign in 1979 where she graduated Phi Beta Kappa. Barbara is a member of the ABA, the ISBA, the CBA, the DCBA, the WBAI, as well as the American Bankruptcy Institute, Turnaround Management Association and the International Women's Insolvency and Restructuring Confederation.

Barb Mendralla

From: Barbara Mendralla <bmendralla@dcba.org>
Sent: Friday, August 28, 2020 12:01 PM
To: Barb Mendralla
Subject: August 28th Issue of The Friday Files from the DCBA Law Practice Management & Technology Section

The Friday Files

DuPage County Bar Association Law Practice Management and Technology Section

August 28, 2020

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Questions? Please contact staff liaison, Barb Mendralla at bmendralla@dcba.org or 630-653-7779.



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YOUR SUCCESS. OUR FOCUS.

Post-Covid Options for Distressed Companies


PRESENTED BY

Barbara L. Yong, Esq.

For the DuPage County Bar Association
September 16, 2020

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Barbara graduated from Loyola University School of Law in 1982 and received her undergraduate degree from the University of Illinois at Urbana-Champaign in 1979 where she graduated Phi Beta Kappa. Barbara is a member of the Illinois CPA Society, the American Bar Association, the Illinois State Bar Association, the Chicago Bar Association, the DuPage County Bar Association, the Women's Bar Association of Illinois, the American Bankruptcy Institute, the Turnaround Management Association and the International Women's Insolvency and Restructuring Confederation

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Agenda

- Insolvency Defined
- Risks when Operating in the Zone of Insolvency
- Turnaround or Wind Down
- Bankruptcy and Non-Bankruptcy Options
- Traditional Chapter 11 vs. New Small Business Bankruptcy
- Wrap Up

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Insolvency Defined

- Balance Sheet Test – More Liabilities than Assets; or
- Unable to Pay Debts when due

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Operating in the Zone of Insolvency

- Business owners' have a fiduciary duty to operate in the "best interests of creditors."
- Can be held personally liable for newly created business debt.

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Time to Decide: Can you Return to Profitability or Close the Business

- Recommend performing 13-week cash flow analysis
 - Fixed vs. variable costs
 - Revenue Projections
- Cost cutting measures
- Operational changes
- Renegotiate loans, leases, vendor business terms

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Business Debtors Have Options:

- Non-bankruptcy Wind Down
- Chapter 7 = Liquidation
- Chapter 11 = Reorganization
- Sub V = All New Rules! “Small Business” Reorganization
- Assignment for Benefit of Creditors = non-judicial liquidation

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Individual Debtors Have Options:

- Chapter 7 = Liquidation
- Chapter 11 = Reorganization
- Chapter 13 = “Wage Earners” Reorganization
- Negotiate payment plans directly with creditors

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Winding Down a Business

❑ Option 1: Self-Conducted Wind Down

- Two years from shutting down
- Notify creditors and customers
- Employees get COBRA and can file for Unemployment
- Liquidate assets
- Must pay creditors before owners

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Winding Down a Business

❑ Option 2: Bankruptcy

- | | |
|--|--|
| <ul style="list-style-type: none"> ▪ Chapter 7 ✓ Business shut down ✓ Notice to Creditors ✓ Liquidation ✓ Trustee appointed by Court | <ul style="list-style-type: none"> ▪ Chapter 11 ✓ Can keep operating ✓ Notice to Creditors ✓ Liquidation or restructuring ✓ Debtor-in-possession ✓ <i>New Subchapter V offers streamlined procedures for smaller business debtors</i> |
|--|--|

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One Benefit of Bankruptcy: Automatic Stay

- Filing a bankruptcy petition under ANY chapter triggers the Automatic Stay
- It stops all litigation and collection activity of every kind, even if creditors are not yet aware
- Creditors who violate the stay can face liability: sanctions and fees

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Chapter 7 = Liquidation: Businesses

- No Debt Limit
- A trustee is appointed to review all schedules, take possession of all assets, and collect payments made in last 90 days before petition (preferences)
- Debtor's owner(s) must sit for questions by Trustee, some creditors
- Secured lenders get their collateral
- If there are unencumbered assets, the Trustee sells them for cash
- Creditors who timely file claims get a pro rata distribution

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Chapter 7 = Liquidation: Businesses

- No Exemptions – all assets of the business are property of the estate
- No discharge for business entity - it is dissolved
- Time from Petition to Closing of Case – usually 120 -150 days (unless there are assets or preferences to liquidate and distribute)

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Chapter 11

- Intended for businesses with debts that are too excessive to pay off in the time demanded by creditors.
- Permits a corporation, partnership, or individual to continue to maintain their affairs and restructure their debts in order to pay a more manageable amount of what is owed.
- Should not be considered unless the undisputed debts exceed \$2,725,625.

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Chapter 11

- Primary goals of a Chapter 11 filing are to:
 - provide for an equality of distribution among creditors of equal priority to prevent a race to the courthouse by those same creditors;
 - preserve the business whose intrinsic value is worth more than its liquidation value; and
 - to ensure that distributions be fair and equitable between classes.

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Chapter 11

To enable reorganization:

- Debtor is permitted to continue to operate as a Debtor-in-possession and remain in possession of all of its assets;
- an automatic stay stops collection of all prepetition claims and stops creditors from interfering in the Debtor-in-possession's operations;
- Debtor-in-possession can use, sell, or lease property of the estate;
- Debtor-in-possession can obtain financing for its customary business operations;
- Debtor-in-possession can offer incentives to the lender; and
- Debtor-in-possession can elect to assume or reject any leases or executory contracts.

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Chapter 11

Protection for Creditors

- Creditors can obtain a dismissal of the case if it was filed in bad faith or if there is no feasible prospect of a Plan.
- Creditors can obtain appointment of an independent trustee or examiner if there is evidence of fraud, gross incompetence, or misdealing.
- Secured creditors may obtain relief from the automatic stay if their interests are not adequately protected and the property is not necessary to reorganize the Debtor.
- Secured creditors can obtain adequate protection when property it has a secured interest in is being used, sold, leased, or borrowed.

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Chapter 11

The U.S. Trustee can:

- Appoint committees of creditors to investigate the Debtor's past and current operations;
- Oversee the Debtor-in-possession's operations; and
- Negotiate with the Debtor-in-possession concerning the reorganization Plan.

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Chapter 12

- Modeled after Chapter 13 but has Chapter 11 benefits by providing relief for families with regular seasonal income.
- Only available for farmers and fisherman:
 - Family farmer's debts cannot exceed \$4,411,400.
 - Family fisherman's debts cannot exceed \$2,044,225.

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Chapter 12

- A corporation can file a Chapter 12 if:
 - More than 50% of the stock or membership interest is held by one family or relatives of the members of the family AND the family actually conducts the farming or fishing operations;
 - An automatic stay of enforcement of any acts to collect money or foreclose on property goes into effect upon the filing of the case; or
 - The Debtor remains in possession of the property of the estate.

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Newly Enacted SBRA – Subchapter V

- Enacted by Congress due to the small number of successful small business reorganizations.
- Signed into law on 8/26/19
- Effective 2/19/20
- Jurisdictional debt limit was originally \$2,725,625
- Increased to \$7,500,000 on 3/27/20
- Single asset real estate debtors are excluded

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Who May File:

- Chapter 11**
 - Businesses
 - Individual with debts that exceed Chapter 13 jurisdictional limits
- Subchapter V**
 - Businesses or individuals with total debts under a certain amount as long as 50% of the debt is related to a business

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Modifications of Liens

❑ Chapter 11

- Liens can be modified only to the extent permitted by §506
- Debtor must bring an adversary case to determine the extent and priority of the lien

❑ Subchapter V

- The plan may modify a lien of a security interest in real property of a principal residence if:
 - ✓ The loan was used in connection with a small business; and
 - ✓ The loan was not used to purchase the property
- Other liens?

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Trustee

❑ Chapter 11

- Standing trustees from the U.S. Trustee's Office oversee the case

❑ Subchapter V

- A Case Trustee is appointed; an experienced turnaround professional

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Creditors Committee

Chapter 11

- A creditors committee can be formed with approval of the U.S. Trustee's Office
- The creditors committee oversees and is involved in the Chapter 11 process

Subchapter V

- No Creditors Committee

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Disclosure Statements

Chapter 11

- Debtor must submit a disclosure statement with the plan in order to provide creditors with adequate information about the debtor's operations and the plan

Subchapter V

- No disclosure statement required unless ordered by the court

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Timing of Filing of the Plan

Chapter 11

- Debtor has an exclusive period of 300 days which may be extended

Subchapter V

- Must be filed within 90 days of the filing of the case

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Who May File a Plan

Chapter 11

- Once the exclusive period ends, anyone can file a plan

Subchapter V

- Only the debtor

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Consensual Plan

❑ Chapter 11

- The concept does not exist

❑ Subchapter V

- Debtor must seek consent a plan from creditors
- Within 60 days after filing the case, the debtor has to report the status of consent from creditors

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Components of the Plan

❑ Chapter 11

- The plan gives creditors at least as much as they would have received in a Chapter 7 liquidation
- The plan must be feasible, fair and equitable

❑ Subchapter V

- Debtor must commit disposable income to the plan for at least 3 but not more than 5 years and give creditors at least what they would have received in a Chapter 7 liquidation
- The plan has to provide a mechanism to protect creditors in the event of a default

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Plan Confirmation

Chapter 11

- Creditors get to vote on the plan
- At least one impaired, non-insider class has to accept the plan

Subchapter V

- If the debtor obtains consent from all creditors, the plan is confirmed
- If the debtor does not obtain consent, confirmation depends on whether the judge deems the plan to be feasible, fair and equitable
- Voting on the Subchapter V plan?

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Payment of Administrative Expenses

Chapter 11

- Must be paid by the Effective Date

Subchapter V

- Debtor can spread the payments over the life of the plan

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Absolute Priority Rule

Chapter 11

- Equity security holders must provide new value or permit competing plans in order to obtain an equity in the reorganized debtor

Subchapter V

- Does not apply

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Post Confirmation Plan Distributions

Chapter 11

- Can be any of the following:
 - ✓ Debtor
 - ✓ Creditors Committee
 - ✓ Distribution trustee

Subchapter V

- If a consensual plan is confirmed, the debtor makes the distributions
- If the plan is not consensual, the Case Trustee makes the distributions

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Discharge

Chapter 11

- Upon confirmation of a corporate reorganization plan
- After all plan payments are made by an individual debtor

Subchapter V

- If a consensual plan, upon confirmation
- If not consensual, then after all plan payments have been made

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Winding Down a Business

Option 3: Assignment for Benefit of Creditors

- Outside of Court
- Select Assignee (trustee)
- Notice to Creditors
- Liquidation / Assets sold via auction process
- If done quickly, can sometimes preserve the going concern value

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Winding Down a Business

Option 4: Return Collateral to the Secured Lender to Liquidate

- If the Bank holds a blanket lien on the Business Assets, can turn over the personal property – cash, accounts receivable, inventory, furniture and equipment.
- Real estate can be foreclosed or negotiate a Deed in Lieu.
- Bank must liquidate collateral in a reasonable manner or will lose the right to enforce personal guaranties.

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Concluding Thoughts

- All of these alternatives are preferable to ignoring the warning signs of a struggling business.
- Be proactive and act responsibly.
- Avoid personal liability as much as possible: Personal guaranties, Income Taxes, Sales Tax, Union Dues, Unfunded Pensions, Unpaid Wages, etc.
- Consider filing a personal bankruptcy.
- Avoid getting sued and paying a lot of unnecessary legal fees.

Only those who dare to fail greatly can ever achieve greatly.
Robert F. Kennedy

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