INSIDE THE MINDS

Chapter 7 Commercial Bankruptcy Strategies

Leading Lawyers on Navigating the Chapter 7 Filing Process, Understanding Bankruptcy Trends, and Advising Clients

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The Fundamentals of Chapter 7 Liquidation of a Business under the U.S. Bankruptcy Code: Issues for the Debtor, Creditors, and Other Parties

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Introduction

My practice focuses on all aspects of creditors' rights, insolvency, and reorganization and, including bankruptcy, under Chapter 7 and other chapters of the U.S. Bankruptcy Code. Below, I describe and discuss aspects of a bankruptcy case under Chapter 7 for a business entity under Chapter 7 of the Bankruptcy Code. I have also sought to provide information and guidance to various parties involved in Chapter 7 cases, to help them consider all aspects of each bankruptcy case and achieve the best possible results from bankruptcy.

Overview of Chapter 7 Law

Chapter 7 is the liquidation chapter of the Bankruptcy Code. Most business entities have the ability to voluntarily file for Chapter 7 liquidation with a U.S. bankruptcy court, or can be forced into Chapter 7 by an involuntary petition by creditors in the bankruptcy court. Whether by voluntary or involuntary filing, most business entities can be liquidated under Chapter 7, though different provisions of the chapter apply to certain types of business entities.

Once a Chapter 7 case begins, a bankruptcy estate is created that generally consists of all assets of the debtor company as of the petition filing. A Chapter 7 trustee is also appointed. The automatic stay in bankruptcy becomes immediately effective, stopping nearly all acts of creditors against the debtor and its property (other than actions permitted through the bankruptcy court). With the automatic stay in place, the appointed trustee undertakes the process of reducing the estate property to cash; pursuing, prosecuting, and collecting on claims the debtor company had at the time of the case filing; bringing certain so-called avoidance actions and collecting on these lawsuits; and, ultimately, distributing the proceeds of these efforts to the creditors of the bankruptcy estate in accordance with legal priorities. The trustee generally accomplishes these tasks in the bankruptcy court. For example, most lawsuits to recover assets of the estate are brought by the trustee in the bankruptcy court, and controversies about the amount and priorities of claims of creditors against the bankruptcy estate are generally litigated in the bankruptcy court.

The trustee concludes his or her work by filing a report with the bankruptcy court in which he or she states that he or she has administered all of the assets and claims of the bankruptcy estate, and delivered the proceeds to creditors in the appropriate priority. The results of these distributions are included in the report. Upon the filing of this report, the Chapter 7 case is closed by the bankruptcy court. The Bankruptcy Code includes provisions for reopening a case in some circumstances if assets are subsequently found for liquidation and distribution, but generally, the case's closure ends the Chapter 7 case.

What Companies Can Become Subject to Chapter 7 Liquidation?

Generally, only business entities that have at least a place of business or property in the United States can be a debtor in a case under the Bankruptcy Code. However, certain types of business entities, such as railroads, most insurance companies, and most types of savings banks, cannot be debtors under the Bankruptcy Code, regardless of their or their property's location. The Bankruptcy Code precludes these types of companies from relief under the Bankruptcy Code because there are other legal regimes for their liquidation or reorganization.

Some types of business entities cannot be debtors in bankruptcy except under Chapter 7. These include stockbrokers and commodity brokers (and these entities have specific provisions in the Bankruptcy Code's Chapter 7 that address the particular features and nature of their businesses).

How Does a Chapter 7 Case Begin: Voluntary versus Involuntary

If a company's management determines to file for liquidation under Chapter 7, a voluntary petition for this relief is filed with the bankruptcy court. Such a voluntary filing automatically begins the Chapter 7 process without any order required from the bankruptcy court—the petition itself is deemed to be an order for Chapter 7 relief by the bankruptcy court.

Creditors of a company can seek a Chapter 7 liquidation of the entity as well, against the debtor's will. The Bankruptcy Code sets specific requirements for the initiation of a Chapter 7 case by an involuntary petition. First, only creditors that have some portion of their claim that is

unsecured may successfully file a petition. Generally, if the company has twelve or more unsecured creditors whose claims are not contingent as to liability nor the subject of a bona fide dispute as to liability or amount, at least three such creditors with claims totaling in the aggregate at least $13,475 must file the petition for Chapter 7 if the company is to be successfully put into bankruptcy. If the company has fewer than twelve such creditors, excluding employees, insiders, and creditors that are subject to avoidance actions (described below), only one unsecured creditor is required for a successful petition, but only if the creditor has an unsecured claim of at least $13,475.

In some cases, a creditor filing an involuntary petition might later change its mind. Such a turnabout can occur following discussions with the involuntary debtor company after a petition for Chapter 7 relief has been filed, during which the creditor becomes comfortable that a Chapter 7 is not necessary, or because the debtor pays the creditor or promises to pay the creditor. However, though a creditor that filed a petition can make a motion to dismiss the petition, once a creditor requests Chapter 7 relief against a debtor company, it is difficult to "pull back." The bankruptcy court will often resist dismissing an involuntary chapter 7 case in these circumstances, and instead will generally seek to adjudicate the petition. Creditors should also bear in mind that, if the petition is not granted by the bankruptcy court, the debtor might be able to recover fees, costs, and damages against the creditor(s) that filed the petition. For these reason, creditors who file a petition for bankruptcy against a debtor should be very certain that liquidation under chapter 7 is the desired result and will likely achieve a benefit.

Once an involuntary petition is filed (and if it is not thereafter dismissed), the bankruptcy court must adjudicate the petition to conclude whether the petition should be granted and a Chapter 7 case begun. If the involuntary debtor objects to the petition, the bankruptcy court must hold a trial to determine whether the debtor company is generally not paying its debts as such debts become due (unless such debts are the subject of a bona fide dispute as to liability or amount). Assuming that there has not been a custodian appointed or that took possession of debtor property within 120 days before the date of the petition filing (in some circumstances, such an event can provide separate grounds for an adjudication into Chapter 7),

then only a bankruptcy court determination that the purported debtor company is generally not paying its debts will cause the company to be forced into Chapter 7. If the court orders the company into Chapter 7, the debtor company has the right in most instances to convert the case from Chapter 7 and go into chapter 11, which is the reorganization chapter of the Bankruptcy Code (though the debtor needs to be otherwise qualified as a Chapter 11 debtor).

A charitable entity cannot be put into an involuntary bankruptcy.

Once a Case Begins, What Happens to the Debtor and Its Property?

When a company goes into Chapter 7, an interim trustee is quickly appointed with the full powers and authority over the debtor's assets, to the exclusion of the debtor and its management. The creditors of the Chapter 7 debtor have the opportunity to elect a different trustee if they are not satisfied with the appointed interim trustee. If the creditors take this opportunity and are successful in electing a different trustee, the newly elected person becomes the permanent trustee of the Chapter 7 debtor. Otherwise, the interim trustee automatically becomes the permanent trustee.

The trustee's job is to collect all of the debtor's assets and distribute them based on the priorities for creditor claims as established under the Bankruptcy Code. The trustee will do his or her best to obtain and recover assets of value for the estate, and commence and prosecute any valuable litigations that are subject to her authority. As creditors assert claims, the trustee also reviews them to determine if he or she believes they are accurate. The trustee has the ability to object to claims before the bankruptcy court, and the court will adjudicate these objections and potentially reduce the creditors' claims or change the claims' priority.

Once the trustee starts his or her work and has control over the debtor's assets, there are still some duties for the debtor. The bankruptcy laws require that the debtor company (usually through its management) attend and submit to examination and assist the trustee in locating assets, prepare inventories and other schedules, and examine asserted claims. It is important for the debtor company, prior to the initiation of a Chapter 7 bankruptcy case, to assemble the information that would be required to be

provided to the Chapter 7 trustee. If this effort is not completed, the Chapter 7 trustee could begin pursuing principals of the debtor company to require them to provide the information. There is, however, a limit to the amount of assistance the trustee can require from former debtor employees, officers, and the like. For this reason, a trustee may seek to hire former debtor officers or employees to work for the bankruptcy estate to assist in fulfilling the trustee's obligations. Such a retention can help assure robust cooperation from the debtor's former principal(s). Retaining the services of any former principal of the debtor will require bankruptcy court approval.

What Happens in a Chapter 7 Case?

Immediately upon her appointment, the trustee in a Chapter 7 case takes control of the debtor's property. Moreover, upon the filing of a Chapter 7 petition, the automatic stay in bankruptcy takes effect and prohibits any creditors or other third parties from taking steps to enforce claims against the debtor or its property. With this protection, the trustee has the ability to carefully investigate the debtor, its business, and its financial affairs. This investigation provides the trustee with the basis for fulfilling his or her other duties under bankruptcy law. The trustee will usually undertake an intensive investigation upon his or her appointment, with continuing investigation thereafter focusing on specific potential assets and claims.

Assets Located and Collected

When the Chapter 7 case begins, the trustee takes control of virtually all property of the debtor. The coverage of the property that becomes part of the bankruptcy estate is broad: with a few exceptions, it covers all legal or equitable interests of the debtor in property as of the commencement of the Chapter 7 case. The Bankruptcy Code requires third parties to deliver to the trustee, and account for, any property of the debtor at the case's commencement or such property's value, unless such property is of inconsequential value. The trustee will work to make sure he or she obtains all such property, and he or she is assisted in this endeavor by the ability to issue subpoenas to obtain documents and deposition testimony and conduct other discovery (with court approval). If the trustee identifies property of the estate that has not been turned over, he or she can sue to require its delivery.

Assets Liquidated

The trustee seeks to reduce the assets of the estate to money. He or she generally does so by selling the property. If there are liens or other interests of third parties (such as mortgagees or other secured parties) in the property, assuming the trustee determines that there is equity for the estate in such assets, the trustee has the authority to sell them, though such a sale generally will require bankruptcy court approval. Furthermore, if the trustee meets certain legal requirements, he or she can use the bankruptcy court to sell such assets free and clear of the third-party interests, again, after court approval. In this manner, the trustee is able to sell property, stripped of its liens, to third parties, with the liens attaching to the proceeds (to the extent of such liens). This mechanism can help the trustee realize the highest value from the sale of the property.

Avoidance Actions Pursued

The Bankruptcy Code gives the trustee the authority to pursue certain legal claims, many unique to the Bankruptcy Code, known generally as avoidance actions. This authority, for example, permits the trustee to avoid unperfected liens in the property of the estate. The Bankruptcy Code also enables the trustee to bring suits for avoidance and recovery of fraudulent transfers (generally, transfers or the incurrence of an obligation by the debtor before the bankruptcy case's commencement that were either intended to hinder creditor recovery or caused the debtor to receive less than "reasonably equivalent value" in exchange for such transfer or obligation) when the debtor was insolvent or that rendered the debtor insolvent). Another important avoidance power of the trustee is the ability to recover preferential transfers. These actions enable the trustee to "claw back" payments made within the ninety days before the case commencement (or in the year before the commencement, in the case of transfers to or for the benefit of insiders) that were made on account of an antecedent debt. It is important to note, however, that there are a number of defenses and exceptions to preference liability—not all payments on account of antecedent debt are subject to recovery.

Pursuing Other Lawsuits

Beyond avoidance action lawsuits, the trustee takes the debtor's place in most pending lawsuits of the debtor, and generally has the right to bring claims and suits the debtor would have otherwise had the right to bring. These actions can prove to be valuable for the estate, and can often add to the funds available for creditor recovery. Indeed, the Bankruptcy Code supports at least one of these grounds for recovery to the estate. If there is a deficiency of property of the estate to pay in full all allowed claims of the estate, the trustee of a partnership debtor has powers to recover the amount of the deficiency from general partners of the partnership.

Operate the Business?

Most Chapter 7 trustees liquidate the property of the bankruptcy estate without engaging in the former business of the debtor. However, in some cases, the trustee may find it useful to operate some or all of the debtor's former business. These circumstances can arise in a situation of a debtor that is a manufacturing company, where the trustee might seek to maximize recoveries by completing unfinished inventory to sell it for a higher price. As another example, the trustee might identify a buyer for the ongoing operations of the debtor's business—but to realize the value of such a sale, the business must continue operating. In these circumstances, even though Chapter 7 is designed for liquidation, the trustee can request the authority from the bankruptcy court to operate the business or part of it, though only for a limited period.

Other Obligations

The trustee has certain specific obligations in certain circumstances, which do not arise in all cases. For example, if the debtor served as the administrator pursuant to the Employee Retirement Income Security Act (the federal law on retirement income security) of an employee benefit plan, the trustee is required to continue to perform the obligations required of the administrator. If the debtor was a health care business, the Bankruptcy Code requires that the Chapter 7 trustee use all reasonable and best efforts to transfer patients to appropriate new health care facilities.

Distributions Made

When the assets are liquidated and reduced to cash, the Chapter 7 trustee is charged with distributing the funds. Prior to distributing, however, the trustee must consider the claims asserted in the case and seek a determination from the bankruptcy court if he or she disagrees with the amount or the priority of any of the claims. Once the claims are clarified, the trustee can initiate distributions based on the priorities set forth in the Bankruptcy Code. Generally, secured creditors receive the property in which they have a lien or the value thereof (up to the amount of such creditors' claim). Among unsecured claims, there are a number of statute-based priorities for some unsecured claims that must be paid before other unsecured claims. For example, claims arising from the administration of the bankruptcy estate are paid first, before general unsecured claims against the bankruptcy estate. Many types of claims related to, among other things, taxes, unpaid wages, and unpaid contributions to an employee benefit plan are also afforded priority over general unsecured claims.

What Is the Effect of a Chapter 7 Filing on Creditors?

Secured Creditors

A secured creditor should regard a Chapter 7 filing with caution. If the Chapter 7 trustee liquidates a secured party's collateral, the secured creditor maintains its right to receive the net proceeds of the liquidation, up to the amount of its claim. In fact, if the value of the collateral is greater than the secured creditor's claim as of the case's commencement, the secured creditor also has the right to post-petition fees, expenses, and interest in many circumstances. However, the trustee also has the right to charge against collateral that he or she liquidates the reasonable and necessary costs and expenses of performing the liquidation and preserving the collateral, to the extent that his or her efforts benefit the secured claimant.

In light of the foregoing, a secured creditor is well advised to promptly consider a motion before the bankruptcy court to obtain relief from the automatic stay so that the secured creditor can enforce its rights in its collateral directly, pursuant to applicable state law or other non-bankruptcy law. In many cases, liquidation of collateral by a Chapter 7 trustee will result

in a reduced recovery compared to a direct foreclosure or other realization by the secured creditor. While some circumstances exist where a trustee's liquidation is more advantageous, a secured creditor will often find itself in a better position to bargain with the trustee about possible limits on the trustee's charge against the collateral in the case of a trustee liquidation, if the secured creditor has a stay relief motion filed.

In some cases, the trustee has no interest in liquidating a secured party's collateral. This is frequently the case if there is no indication of any equity in the property for the benefit of the estate, or even if the property is simply too expensive to maintain. In these situations, the Chapter 7 trustee can abandon property of the estate, after notice and hearing before the bankruptcy court. In effect, by abandoning the property, the trustee releases it from the bankruptcy estate, making it subject to the rights of a secured party, with no further protection of the automatic stay.

Unsecured Creditors

Most creditors without collateral who are owed money by the debtor will receive a *pro rata* distribution with other unsecured claimants from the net proceeds collected by the Chapter 7 trustee. However, unsecured creditors should carefully evaluate whether their claim might enjoy a priority status, which gives a right to payment before distributions to the unsecured claimants as a whole. As an example, trade creditors should be aware that a claim for the value of any goods received by the debtor within twenty days before the date of commencement of the bankruptcy case, where the goods have been sold to the debtor in the ordinary course of the debtor's business, enjoys a priority ahead of general unsecured creditors. Trade creditors may also be entitled to assert a reclamation demand against the debtor for goods delivered to the debtor in the forty-five days before the petition date, pursuant to which the debtor must return such goods to the creditor to the extent the debtor still possesses the goods and the goods are not subject to a secured creditor's lien. Such a demand must generally be made no more than twenty days after the petition date in the bankruptcy case.

All unsecured creditors should be careful to file a proof of claim in the bankruptcy case on a timely basis, if required to do so. (A secured creditor usually should file a proof of claim as well, especially to protect its ability to

assert any deficiency claim as an unsecured claim, after realization on its collateral). The deadline for such filing for most creditors is ninety days after the first date set for the meeting of creditors under Section 341 of the Bankruptcy Code. (All creditors receive notice of this meeting, and it generally includes a notice setting forth the proof of claim filing deadline as well.) The ninety-day deadline does not apply, however, if the case appears to have no net assets for distribution and the bankruptcy court issues a notice to creditors that no proof of claim need be filed. Despite such a notice, creditors should continue to monitor the bankruptcy case, especially since a trustee may later identify assets that could provide a distribution to creditors. In this circumstance, a subsequent notice would issue, setting a proof of claim deadline thereafter.

What Is the Effect on Parties to Contracts with the Debtor?

The non-debtor parties to so-called executory contracts and unexpired leases with the debtor should carefully monitor the bankruptcy case. Such contracts and leases are often of no value to the Chapter 7 trustee. The trustee may, therefore, seek to reject them, or simply allow the automatic rejection of these agreements to occur under the Bankruptcy Code. (In Chapter 7, unexpired leases of residential real property and executory contracts are automatically rejected at sixty days from the order from relief in the bankruptcy case, while unexpired leases of non-residential real property are automatically rejected at 120 days, though in each case the trustee can request further time before rejection from the bankruptcy court.) In some circumstances, however, the trustee may seek to assume and assign these contracts or leases to a third party. The non-debtor party to an executory contract or unexpired lease in this circumstance has rights to receive a cure of most defaults under the contract or lease, and assurances of future performance from the assignee.

Advice for Attorneys

The Chapter 7 liquidation of a business entity can seem deceptively simple. While not as complex as some other chapters of the Bankruptcy Code, it behooves attorneys to keep in mind strategic questions that can arise in Chapter 7 to obtain the best results for their clients. Below are outlined

some considerations and strategic pointers, which should help attorneys provide the best assistance for clients in Chapter 7 cases.

Strategic Considerations

The Debtor and Its Principals

For the officers and other responsible management of the debtor, filing a voluntary Chapter 7 petition can provide an effective way to fulfill fiduciary obligations to a company's stakeholders upon insolvency, when no opportunity for a restructuring or other non-liquidation approach to winding up the company is available. Company principals should be aware, however, that the Chapter 7 trustee will likely investigate the actions and behavior of the company's management, especially in the period leading up to the bankruptcy filing, with an eye toward determining if any liability to the debtor entity exists (the trustee likely has the authority to bring derivative suits on behalf of the debtor company/estate). For this reason, company management should consider the potential of any such liability and review the status and coverage of any directors' and officers' liability insurance that may be available before effecting a Chapter 7 filing.

Creditors Forcing a Company into Chapter 7

There are often good reasons for unsecured creditors of a company to seek an involuntary Chapter 7 case, if the creditors believe the company is insolvent or otherwise not paying its debts. If a Chapter 7 is successfully petitioned, the trustee will liquidate the company's assets in a relatively efficient manner, for distribution in accordance with the Bankruptcy Code. Particularly for unsecured creditors with relatively small claims, where the time and expense of suing on the debt, obtaining a judgment, and enforcing the judgment against debtor assets is often not cost-effective, Chapter 7 offers a way to realize potential value. Forcing a debtor into chapter 7 may also be attractive to creditors in the case of a debtor that is paying some creditors in preference to other creditors, since the bankruptcy code provides a mechanism for certain such preferential transfers (generally limited to those made within the ninety days before the involuntary filing) to be recovered and redistributed to unsecured creditors on a *pro rata* basis.

(Such actions to avoid and recover such preferential transfers are a type of avoidance action, discussed above.)

Before filing an involuntary petition, however, a creditor should consider a number of factors. First, to what extent might independent enforcement of its claim for indebtedness provide better results than forcing a Chapter 7 case? This decision must weigh the likely costs and expenses of pursuing a judgment independently, and the likelihood of successfully collecting on the judgment, against the concern that a creditor's *pro rata* share of a net distribution in a Chapter 7 liquidation may prove to be a relatively small amount of money.

The creditor contemplating an involuntary filing against a debtor company must also consider the extent to which it may be subject to avoidance actions by an eventual Chapter 7 trustee. At a minimum, the creditor should review any payments or other benefits it has received as a non-insider creditor during the ninety days before the petition date to determine if there may be liability for a preferential transfer from the debtor company. If the creditor is subject to potential liability for a preferential transfer, the creditor in question may achieve a Chapter 7 bankruptcy through a petition, yet then find itself subject to a lawsuit to recover preferential payment(s) that it received brought by the Chapter 7 trustee of the former debtor company.

The Interim Trustee and the Permanent Trustee

As mentioned above, unsecured creditors in a Chapter 7 case have the right to seek to elect a different trustee from the interim trustee to serve as the permanent trustee in the bankruptcy case. Such an election would occur at the creditors' meeting under Section 341 of the Bankruptcy Code, which is organized and held under the direction of a government official known as the U.S. trustee. To vote in such an election, a creditor must have a fixed, liquidated, and undisputed claim that is allowable in bankruptcy and is unsecured, and otherwise must not have an interest that is materially adverse to the interests of the creditor body as a whole. If 20 percent of all creditors meeting the above requirements seek an election, it will be held. If such 20 percent actually vote in such an election, the person receiving the

majority in amount of creditor claims with regard to such votes will become the permanent trustee, rather than the previously named interim trustee.

Unsecured creditors in a Chapter 7 case should consider the possibility of voting to install a permanent trustee of their liking. If there is sufficient coordination among unsecured creditors, the right to seek an election of a permanent trustee permits creditors to vote in a trustee that might have particular expertise in the debtor's industry or line of business, or simply otherwise be a more capable liquidator than the interim trustee.

Enduring Liability of a Chapter 7 Debtor

Corporations and other business entities will not be entitled to a discharge in Chapter 7. Even after a case is closed, to the extent that creditors are not paid in full from a Chapter 7 case, if the debtor company goes forward and engages in some other business, assets may later become available for creditor enforcement. These post-bankruptcy asserts are fully susceptible to creditor recovery, outside of the bankruptcy process.

William M. Hawkins is a partner with Loeb & Loeb LLP and has more than a decade of experience in counseling secured and unsecured creditors, lessors, equity holders, committees, and other constituencies in credit restructurings, corporate reorganizations, and bankruptcies. His practice encompasses out-of-court, negotiated solutions and alternative dispute resolution, as well as litigated results before a variety of tribunals. He also represents debtor-in-possession and exit financing lenders, purchasers of assets in bankruptcy, trustees, and liquidating trusts in bankruptcy courts. He also counsels clients from the financial services and banking industries in sourcing and acquisition of advanced technical equipment and services, including request for information and request for proposal procedures, agreement negotiation, and procurement management. He is admitted to the New York state courts, and the U.S. District and Bankruptcy Courts for the Southern and Eastern Districts of New York. He has handled matters in the U.S. Bankruptcy Courts for the District of Delaware, the District of New Jersey, the Southern District of Florida, and the Central District of California.

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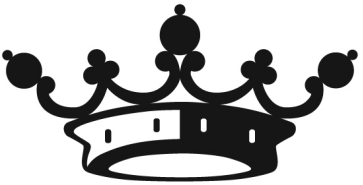

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