

WHAT CANADIANS NEED TO KNOW ABOUT US INSOLVENCY LAW

Jeanette L. Thomas, Perkins Coie LLP
Kibben M. Jackson, Fasken Martineau DuMoulin LLP
Christopher A.M. Stocco, PricewaterhouseCoopers LLP

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I. INTRODUCTION

When a company is on the brink of failure and has assets that span international boundaries, specifically in Canada and in the United States, the need to consider relief in multiple jurisdictions becomes a complex problem for the debtor, its legal advisors and insolvency professionals on both sides of the border. The reality of the situation is that the lack of familiarity with the restructuring and bankruptcy laws and processes in each jurisdiction often forces the debtor and the numerous stakeholders, who may or may not hold the balance of power in such decisions, to pick a less than optimal course of action. To that end, this paper serves to bridge the knowledge gap and provides an overview of the US insolvency and bankruptcy system and its interplay with the Canadian system.

II. UNITED STATES INSOLVENCY PROCEEDINGS – OVERVIEW

In the United States, the primary insolvency proceeding is bankruptcy. Bankruptcy is governed by federal law, rather than state law, and allows the court to administer the assets of either individuals or entities experiencing financial trouble. The Bankruptcy Code is codified under Title 11 of the United States Code – 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"). In addition to federal bankruptcy proceedings, there are a variety of related insolvency proceedings available under state laws. These materials, however, focus on the Bankruptcy Code. Additionally, these materials focus primarily on provisions affecting business debtors rather than individual debtors.

Bankruptcy, as many other areas of the law, has its own terminology. Understanding these terms is often critical to understanding the bankruptcy process. Schedule A sets forth definitions for the most common bankruptcy terms.

A. Chapter 7 vs. Chapter 11

1. Chapter 7.

Chapter 7 is generally referred to as a liquidation case. Chapter 7 is used by both individuals and entities that are unable to pay existing debts.

A Chapter 7 trustee is appointed, collects the debtor's assets and makes distributions to creditors. The United States Trustee for the particular district in which the bankruptcy case has been filed maintains a list of qualified individuals who can serve as Chapter 7 trustees. These individuals are commonly referred to as "panel trustees." They are generally appointed in rotation based upon the order in which petitions under Chapter 7 are filed. In some jurisdictions, however, the rotation may distinguish between business Chapter 7 cases and individual Chapter 7 cases.

The compensation of the Chapter 7 trustee is limited to a percentage of the assets administered. A large number of Chapter 7 cases contain no assets because all the assets have been foreclosed upon by secured creditors or, in the case of individuals, claimed as exempt.

2. Chapter 11.

Chapter 11 is generally referred to as a reorganization case. Chapter 11 is used by businesses or high wealth individuals. Most business bankruptcies are Chapter 11 bankruptcies. The goal is generally to reorganize and emerge from bankruptcy or to sell assets to a third party free and clear of all liens and claims.

B. Key Provisions in the Bankruptcy Code

Bankruptcy offers several useful tools to companies seeking to reorganize. The following section summarizes some of the key provisions.

1. Automatic Stay.

The filing of a bankruptcy case acts as an automatic stay, or injunction, against a wide variety of debt collection and lien enforcement activities used by all creditors and other parties. Specifically, it stays all pending litigation and foreclosure proceedings, prevents parties from enforcing any previously obtained judgments, and stays all acts to collect or recover amounts owed before the petition date, including all attempts to set off debts owed by the creditor to the debtor.

The primary goal of the automatic stay is to provide the debtor with a "breathing spell" — to give the debtor an opportunity to reorganize its operations and affairs for the benefit of all creditors, particularly unsecured creditors. Bankruptcy has been used to stop mass litigation, such as in the Dow Corning bankruptcy case, where a product liability class action suit was crippling the company.

The automatic stay, however, is not inviolate. Parties may file a motion seeking relief from the automatic stay. Secured creditors usually seek relief from the stay on two alternative grounds: (a) for cause, including lack of adequate protection, or (b) if the debtor has no equity in the property and the property is not needed for reorganization. Whether relief from a stay is given to the secured creditor is generally based upon a very fact specific inquiry.

Unsecured creditors may also seek relief from the automatic stay. In most instances, unsecured creditors seek relief from the automatic stay to pursue litigation against the debtor or the debtor's insurer. Where the plaintiff is primarily seeking a recovery from insurance proceeds and the case is fairly advanced, relief is often given. If, however, the case is relatively new and discovery has yet to be concluded, relief from the stay is less frequent.

2. Asset Sales.

A bankruptcy filing generally does not impact a business debtor's ability to continue its business operations. Debtors are authorized to use and sell assets in the ordinary course of business. Although "ordinary course of business" is not defined, it generally encompasses a wide range of routine activities of the debtor's business. For example, a debtor's sale of its inventory to the public for approximately the same prices and in the same quantities as undertaken prepetition would be "in the ordinary course."

Recent trends in Chapter 11 bankruptcy filings involve cases where the case strategy is to sell all or substantially all of the debtor's business in the early stages of the bankruptcy case. This is often done after the debtor has engaged investment bankers to explore its investment and sale opportunities outside of bankruptcy, and has generally established the market for the assets. Any use or sale of assets outside of the ordinary course requires at least 20 days' notice to creditors and other parties. While courts will often shorten the notice period for the approval of bidding procedures and timelines, the overall period is generally more than 20 days. In large part the timing will depend on how widely the debtor's assets were shopped prior to the bankruptcy filing.

Section 363 sales often offer the debtor the best opportunity to maximize the value of its assets for the benefit of its creditors. First, it allows the business to be sold as a going concern, thus retaining its inherent value as an operating business. Second, because the trend is to file these motions in the early stages of the case, it helps alleviate customer and trade vendor concerns about the future operations of the debtor. Third, it provides the purchaser a way to buy only those assets of the debtor that it wants, leaving the undesirable assets behind. Finally, assuming requisite notice is given, it allows a purchaser to buy the assets free and clear of all claims, liens and interests, which cannot often be accomplished under state law.

Section 363 sales require any purchasing opportunities to be made available to others. As a result, most section 363 sales involve the approval of bid procedures that detail what is required to submit a qualified bid, what is required to meet the qualifications as a qualified bidder, and the timing of the bidding process. Bid procedures almost always include the payment of a breakup fee to the original bidder, deemed the "stalking horse", in the event that a third party is the successful bidder. Breakup fees generally are in the range of 2-3%, although there is a trend among courts to only allow the actual and necessary expenses incurred by the lead bidder and to require those bidders to share all expert reports, such as environmental assessments, title reports and Uniform Commercial Code ("UCC") financing reports.

3. Cash Collateral/DIP Financing.

Critical to most debtors is the ability to utilize cash collateral or obtain new financing to continue operations. Although a debtor is authorized to sell inventory in the ordinary course, if the debtor has a secured lender with a blanket lien on all of its assets, the debtor may not use the proceeds from those sales in its operations absent the consent of its lender or an order from the bankruptcy court authorizing its use. In non-consensual situations, the bankruptcy court will prohibit or condition the use of cash collateral to ensure that adequate protection is given to the party who has a lien or other interest in that property.

Adequate protection can take many forms. If no equity cushion exists, adequate protection is usually provided by either (a) periodic payments to the secured party or (b) an additional or replacement lien on the debtor's property. Whether adequate protection has been provided is very fact specific analysis. Often because this issue arises at the very beginning of a Chapter 11 case, the debtor is given the use of cash collateral for an interim period. Thereafter, the use of cash collateral is often approved in increments of 3 or 6 months. In fact, even where the parties are in agreement on the use of cash collateral, the lender will likely only allow it for

short periods of time, often 12 weeks. This allows the lender to keep a tighter rein on its exposure than it had before.

Although a debtor may obtain unsecured credit and incur unsecured debt "in the ordinary course of business," trade credit alone may not always be sufficient to allow the debtor to continue its operations. In those instances, the debtor may seek to obtain debtor in possession financing, referred to as DIP financing, from either its existing lender or a new lender. This financing must be approved by the bankruptcy court.

Credit may be obtained on an unsecured basis, a priority basis or a secured basis. Unsecured credit is generally never available. In fact, most financing is only obtained by providing some level of security, either a lien on property of the estate not otherwise subject to a lien or a junior lien on property already subject to a prior lien. Finally, it is possible for the debtor to obtain financing that is secured by a senior or equal lien on property of the estate that is already subject to a lien. Because this financing will directly affect existing lienholders, the debtor must demonstrate that the interests of preexisting lienholders will be adequately protected. Generally, to "prime" a preexisting lien, the debtor must establish that there is a sufficient equity cushion so that the existing lienholders will not be harmed by the imposition of a senior or equal lien.

In addition, the secured party may be able to obtain other protection such as: (a) cross-collateralization of the prepetition debt with postpetition collateral; (b) a superiority administrative claim, with priority over all other priority and unsecured claims, including professional fees (except to the extent of any carve out); (c) disclosure provisions such as operating budgets, financial reporting and insurance maintenance; (d) a restriction on other borrowing unless the postpetition loan is paid; and (e) the application of payments against prepetition debt, rather than postpetition debt.

4. Treatment of Executory Contracts.

The Bankruptcy Code contains special provisions regarding executory contracts, which include unexpired leases. Although the Bankruptcy Code does not define the term executory contract, the generally accepted definition is a contract "on which performance is due to some extent on both sides." A contract that has been terminated or that has expired before the commencement of a bankruptcy case is not executory.

Section 365 of the Bankruptcy Code allows the debtor, with court approval, to assume, reject or assume and assign executory contracts. Section 365 is a powerful tool that allows a debtor to otherwise terminate executory contracts that it would otherwise be unable to terminate. Assumption of an executory contract means that the contract is in full force and effect. Rejection of an agreement constitutes a breach, which is deemed to occur just prior to the bankruptcy filing and entitles the nondebtor party to assert a prepetition claim for damages against the estate; such claim is treated as a general unsecured claim. In the context of real property leases, this is a tremendous advantage, because the Bankruptcy Code also limits the rejection damage claims on real property leases. One restriction is that an executory contract must be assumed in whole, which means the debtor gets the benefits as well as the burdens of the contract. However, the

threat of rejection can be very powerful and is often used as a means of renegotiating contracts with more favorable terms.

(a) Assumption

The Bankruptcy Code gives a debtor time to decide whether to assume or reject its executory contracts. In Chapter 7 liquidation cases, a contract is deemed rejected unless it is assumed within 60 days after the order for relief is entered or within such additional time as the court permits. In Chapter 11 reorganization proceedings, a debtor has until confirmation of the plan of reorganization to assume or reject executory contracts or leases, other than leases of non-residential real estate. Under the 2005 amendments to the Bankruptcy Code, leases of non-residential real property must be assumed within 120 days. The debtor is given a 90-day extension for cause but may not otherwise extend this date further without the consent of the landlord. In recent bankruptcy cases this has resulted in placing tremendous pressure on debtors to make these critical decisions early in the case, often before they can be completely sure that rejection is the correct decision. In an attempt to balance this inequity, the Bankruptcy Code was also amended to restrict the administrative priority claim on non-residential leases that were initially assumed and then subsequently rejected to 2 years' rent. Otherwise the normal restrictions apply to the rejection claim.

In order to assume an executory contract, the debtor must provide adequate assurance that it will (i) promptly cure any defaults; (ii) promptly compensate the other party for any actual pecuniary loss resulting from the default; and (iii) be able perform the contract in the future. The adequacy of these assurances is governed by the standard of commercial reasonableness, and, thus the debtor does not have to make a showing of absolute certainty of performance. Notwithstanding the foregoing, certain defaults do not need to be cured for the debtor to assume the contract. Specifically, defaults relating to the commencement of a bankruptcy case, the appointment of a bankruptcy trustee or the insolvency or financial condition of the debtor at any time prior to the closing of the case need not be cured for the debtor to assume the contract or release. Although the Bankruptcy Code does not specify the types of contract provisions that relate to the "financial condition" of the debtor, essentially default provisions based on a debtor's profits or revenues are likely to be considered provisions related to the debtor's financial condition. Contract provisions creating defaults solely because of the debtor's insolvency are unenforceable under the Bankruptcy Code. Thus, most standard bankruptcy default clauses are meaningless.

(b) Assumption and Assignment

A debtor also has the authority to assume and then assign executory contracts, notwithstanding anti-assignment clauses, which, with rare exception, are not enforceable. Under the Bankruptcy Code, the debtor is free to assign a contract if it cures any prior defaults and compensates the nondebtor for pecuniary losses, and if the assignee provides adequate assurance of future performance under the contract, which is generally measured by the financial condition of the debtor when the contract was executed. Upon assignment, the debtor has no further obligation under the agreement. Notwithstanding the foregoing, a debtor may not assume or assign contracts to loan money or extend other financial accommodations. This limitation, however, does not extend to ordinary contracts for goods and services that incidentally provide

for extensions of credit. Additionally, a debtor may not assume and assign a contract without the other party's consent if the contract is not assignable under nonbankruptcy law. An example of a contract that is not assignable as a matter of law is a personal services contract.

Because a debtor has an unlimited time to decide whether to assume or reject executory contracts, other than non-residential real property leases, it often leaves the nondebtor party in limbo. While a party is entitled to payment for goods and services rendered, the nondebtor party is often unable to enforce other terms of the contract. There are some actions that a party can take to reduce the effect of this limbo period. First, it can request that the court order the debtor to assume or reject the agreement within a specified time period. These motions are generally only favorably received after the case has been pending for a few months, which ensures that the debtor has had a reasonable time to make its decision regarding assumption or rejection. Second, in limited circumstances, the nondebtor party may be able to obtain an order requiring the debtor to comply with parts of the agreement, the noncompliance of which would unfairly prejudice the nondebtor party.

(c) Rejection

Rejection of executory contracts is infinitely easier than assumption. Generally speaking, the debtor must only establish that based on its business judgment, rejection is beneficial. While nondebtor parties may be able to challenge the effective date of the rejection or the effect of the rejection, it is very difficult to challenge the decision to reject a contract. Although it has been successfully done in a very limited number of cases, the procedure is incredibly fact specific, and usually the rejection has a significant negative impact on the estate, where as assumption would have less impact. Often in these situations, the rejection stems from some inter-party dispute rather than from sound business reasons.

After a contract is rejected, the creditor has a claim for damages, which is treated as if the contract was rejected immediately prior to the bankruptcy filing and as an unsecured claim.

(d) Non-Residential Real Property Leases

The Bankruptcy Code contains special rules for non-residential real property leases. First, as set forth above, the decision on whether to assume or reject such leases must be made relatively early in the case. Second, the damages that can be asserted by the nondebtor party are "capped" by the Bankruptcy Code. Specifically, the rejection damages are capped at "the rent reserved by such lease, without acceleration, for the greater of 1 year, or 15 percent, not to exceed three years, of the remaining term of such lease. Practically speaking, damages on leases with less than 7 years remaining will generally be 1 year's rent. Damages for leases with more than 7 years, 8 months remaining will generally be 15% of the total amount due under the remaining lease. Finally, if more than 12 years are remaining under a lease, the damage claim will be 3 years' rent. The critical issue in calculating the cap is determining what rent is reserved under the lease and whether other damages fall outside of that cap.

5. Avoidance Actions.

The Bankruptcy Code gives the debtor power to avoid certain transfers, including preferences, fraudulent transfers and certain postpetition transfers. The general purpose of these avoidance powers is to ensure equality of distribution among the debtor's creditors.

(a) Preferences

The Bankruptcy Code empowers the trustee or debtor to avoid certain prepetition transfers because of their preferential character. A transfer of a debtor's property is considered preferential if the transfer: (i) is for the benefit of a creditor; (ii) was made on account of an antecedent debt; (iii) was made while the debtor was insolvent (the Bankruptcy Code presumes the debtor is insolvent during the preference period); (iv) was made within 90 days before the date of the filing of the petition, or within 1 year before that date if the creditor is an insider; and (v) was a result of the transfer, and the creditor will receive more than it would have received in a Chapter 7 case.

Preferences are very counterintuitive to clients, who are often owed money by the debtor and are asked to return payments they have received. Initially, the goal of the preference clawback was to ensure that the debtor did not prefer one creditor, say a relative or other close creditor, over any other creditor. Unfortunately creditors who have been the subject of the debtor's slow pay prior to the filing of the bankruptcy are often caught in preference actions, which only adds insult to injury. Although it is generally best to accept any and all payments from a company that is struggling, it is important to be aware of the risks. In particular, settlements must be drafted in a manner that allows the creditor to assert its entire claim, not just the settled amount, if any settlement payments are avoided as preferences.

(b) Fraudulent Transfers

The Bankruptcy Code, like state law, invalidates a debtor's transfers that were made with the actual intent to hinder, delay or defraud creditors. The Bankruptcy Code's fraudulent transfer provisions also allow avoidance of constructive fraudulent transfers, i.e. transfers for less than reasonably equivalent value. Although the determination of what is reasonably equivalent is very fact sensitive, a general rule of thumb is that transfers for less than 70% of the value are constructively fraudulent. The ability to avoid fraudulent transfers is particularly compelling in that, unlike preferences, parties can look back either 4 or 6 years, depending on the underlying state law. It allows creditors to evaluate the transaction with the benefit of 20/20 hindsight.

C. The Chapter 11 Process

Viewed in the most simplistic light, the Chapter 11 process consists of determining the claims against the estate and formulating a plan to pay these claims. While there are a variety of intermediate steps in this process, such as using cash collateral or obtaining DIP financing, rejecting or assuming executory contracts and utilizing avoidance actions, the primary goal is to quantify the claims against the estate as of a particular date and provide for the repayment of these claims, resulting in a discharge to the debtor.

1. Proofs of Claims.

In order for a claim to be allowed claim against the estate, a creditor must either be scheduled as having a claim in the amount that it believes it is due or it must file a proof of claim. In most instances, it is recommended that a proof of claim be filed because a debtor's records are frequently inaccurate. The Bankruptcy Code and Bankruptcy Rules do not establish an automatic deadline for filing proofs of claim. Instead, the time period is either prescribed by local rule or the debtor must file a motion seeking to establish the claims deadline, which is referred to as the bar date. In jurisdictions where the bar date must be established by motion, there is no prohibition against filing a claim at any time after commencement of the proceeding. The only caveat is that the creditor must determine whether claims are to be filed with the bankruptcy court or with a claims agent. In larger Chapter 11 cases, claims are filed with the claims agent and, thus, the best course of action, if filing before the bar date order has been entered, is to file the claim with both the claims agent and the bankruptcy court.

Technically, not all creditors are required to file proofs of claim. Instead, only those creditors whose claims are (a) either not scheduled; (b) are scheduled as unliquidated, disputed or contingent; or (c) are scheduled in the incorrect amount, should file a proof of claim. However, as set forth above, the more prudent action is to file a proof of claim in every instance because it is easier to file a proof of claim than to determine what is contained in the debtor's schedules. Moreover, the schedules are subject to amendment by the debtor. The one instance where it may make sense not to file a proof of claim is where a party does not wish to consent to the jurisdiction of the bankruptcy court. Generally speaking, the submission of a proof of claim or a general appearance in a bankruptcy case constitutes consent to the jurisdiction of the bankruptcy court and a waiver of the right to a jury trial. If a creditor is involved in litigation with the debtor or is a potential target for a fraudulent conveyance action, counsel should consider withholding a proof of claim.

A claim is considered allowed and valid unless and until a party objects to it. Unfortunately, there are no specific time periods in which those objections must be made (unless set forth in a plan of reorganization), so there often is confusion over this issue.

2. The Plan Confirmation Process.

The principal document in a Chapter 11 case is the plan of reorganization. The plan sets out the manner in which, and the extent to which, the claims of creditors will be paid. The ability to control the plan and its timing gives the debtor significant leverage in a bankruptcy case. This leverage, however, is limited. If the debtor is able to file a plan within the exclusivity period, the Bankruptcy Code grants the debtor another 60 days to obtain acceptance of the plan. These exclusive periods for the debtor may be reduced or increased by the court for cause. Cause may include an unusually large or small case or delay by the debtor. As part of the 2005 amendments to the Bankruptcy Code, Congress further limited this right to exclusivity by restricting the exclusive period to file a plan to 18 months after the petition date and the exclusive period to obtain acceptances of the plan to 20 months after the petition date. This was

done in large part to prevent debtors from operating under the protection of the Bankruptcy Code for years.¹

(a) The Disclosure Statement.

The Bankruptcy Code requires the disclosure of "adequate information" before acceptances of a Chapter 11 plan may be solicited by a plan proponent. Creditors and equity security holders must be furnished with (i) a copy of the plan or a summary of the plan; and (ii) a written disclosure statement approved by the court that the plan contains adequate information.²

"Adequate information" is a flexible standard and refers to information that would enable a "hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." A typical disclosure statement would include: (i) description and history of the debtor's business; (ii) reasons underlying the bankruptcy filing; (iii) key events in the bankruptcy case, (iv) financial information; (v) a description of the plan and the means for its execution; (vi) a description of management and transactions with insiders; (vii) a statement of probable tax consequences to all parties; (viii) the feasibility of the debtor's plan and reorganization; and (ix) the risks to confirmation.

Notice of the disclosure statement must be provided to all creditors. Parties who do not believe that the disclosure statement contains adequate information are entitled to object to the disclosure statement. And, while objections aimed at the confirmability of the plan are generally not entertained at the disclosure statement hearing, the court will consider objections that allege that the plan is so fatally flawed that seeking approval is improvident. Generally this is because the plan does not, on its face, meet the requirements for confirmation.

(b) Acceptance/Rejection of the Plan.

A Chapter 11 plan does not have to be approved by each and every creditor and equity security holder in order for the plan to become operative. Instead, a class of claimholders will be deemed to have accepted the plan if more than half in number and two-thirds in amount of those allowed claimholders actually voting on the plan vote to accept the plan. A class of interests will be deemed to have accepted the plan when two-thirds in amount of allowed interests actually voting vote to accept the plan. Because the majority of creditors and interest holders do not vote on the plan, the votes of a few will generally determine whether the plan is confirmed.

(c) Confirmation Requirements.

Section 1129 of the Bankruptcy Code contains specific statutory requirements that must be met in order to confirm a plan. These include that the plan and proponent thereof comply with the applicable provisions of Chapter 11, that the plan be proposed in good faith and not by any means forbidden by law, that the debtor has disclosed information regarding management

¹ The timelines are different for small business debtors.

² There is a trend in smaller or less complicated Chapter 11 cases to streamline this process by combining the disclosure statement hearing and the confirmation hearings into one hearing, thus eliminating one notice period.

and payments made or promised to insiders, and that the plan is feasible and not likely to be followed by a liquidation or need for further financial reorganization. Except for the feasibility requirement, these general requirements are usually easily met. Feasibility, on the other hand, requires an examination of whether the plan has a reasonable prospect for success and often provides fertile ground for dissenting creditors to challenge confirmation of a plan. The courts have held that a reasonable prospect for success does not require a guaranty that the plan will be successful.

In addition, to the above requirements, the debtor or plan proponent must establish that the plan was accepted by each impaired class, and if a member of a particular class has not accepted the plan, whether that creditor will receive at least what it would have received if the case were a Chapter 7 case. This test, referred to as the "best interest of creditor's test," protects dissenting *members* of a class and is distinguished from a "cram down", discussed below, which protects dissenting *classes*.

A plan may be confirmed if all of the requirements for confirmation are met except that not all of the impaired classes have voted to accept the plan. So long as one impaired class of claimholders (other than claims of insiders) has accepted the plan, the plan may be confirmed under the "cram down" provisions of the Bankruptcy Code. In order to cram down a plan, the plan must (i) not "discriminate unfairly," and (ii) be "fair and equitable." In most instances, the most relevant inquiry is whether the plan is fair and equitable. In order for the plan to be fair and equitable, it must generally meet the absolute priority rule. Simply stated, under the absolute priority rule, a class with priority over another class must be paid in full before the other class may receive a distribution. In the context of most cases, this means that secured creditors must be paid in full, to the extent of their collateral, before unsecured creditors may receive any distribution. As to unsecured creditors, a plan will meet the absolute priority rule if unsecured creditors are paid in full before equity receives a distribution. In larger cases, the absolute priority rule is met because equity is cancelled and creditors (either secured or unsecured, depending on the case) will receive all the equity in the company.

It is theoretically possible to confirm a plan that does not satisfy the absolute priority rule if the plan is a new value plan. A new value plan is a plan in which existing equity either retains or obtains new equity in the reorganized debtor in exchange for a contribution of new value. To take advantage of the new value exception, equity holders must contribute value that is: (i) new; (ii) substantial; (iii) money or money's worth; (iv) necessary for a successful reorganization; and (v) reasonably equivalent to the value or interest received.

D. Chapter 15

In 2005, the Bankruptcy Code was amended to include Chapter 15. Chapter 15 integrates the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency into the Bankruptcy Code. Chapter 15, effective in October 2005, replaced section 304 of the Bankruptcy Code, which addressed ancillary proceedings. The new Chapter seeks to foster cooperation between U.S. and foreign courts, debtors, and trustees engaged in cross-border insolvency proceedings.

Under Chapter 15, a foreign representative may file a petition for recognition of a foreign proceeding in a U.S. court. The Chapter 15 notice must be filed in the district court where the debtor has a principal place of business or assets in the United States or, if no such place exists, in the district in which there is a pending action or proceeding against the debtor. After notice and a hearing the court either denies the Chapter 15 filing or recognizes the foreign proceeding.

In the event that the court enters an order recognizing the foreign proceeding it must then classify the proceeding as either a "foreign main" or "foreign nonmain" proceeding. A foreign main proceeding is one in which the pending action is located in the country where the debtor has its center of main interests. A foreign nonmain proceeding characterizes an international proceeding located in a country where the debtor has an establishment, which is any place of operations where the debtor carries out non-transitory economic activities.

For proceedings recognized as foreign main, the debtor receives the benefit of the adequate protection; automatic stay; and sale, use, and lease provisions of the Bankruptcy Code for its property located in the United States. Regardless of how the proceeding is recognized—main or nonmain—the court may issue broad relief including granting stays of execution, preventing the transfer of assets and entrusting the administration of assets to a trustee or examiner. Foreign creditors have the same rights as domestic creditors for proceedings recognized under Chapter 15.

Chapter 15 has proved to be an incredibly easy and efficient means of administering concurrent proceedings. Not only does it offer some of the key protections of the Bankruptcy Code, i.e., the automatic stay and the ability to use or sell property of the estate, it does so without all of the requirements of a typical Chapter 11 proceeding. For example, there is no requirement for a plan because Chapter 15 allows the bankruptcy court to entrust distributions to the foreign representative, if the bankruptcy court has determined that creditors' interests will be sufficiently protected. Additionally, although not clear from the language of Chapter 15, the bankruptcy court has also approved debtor in possession financing, a key component of many Chapter 11 cases. See *In re Destinator Technologies Inc.* [cite].

There are some limitations on Chapter 15. For example, a foreign representative may pursue traditional avoidance actions only if there is another case concerning the debtor pending in the U.S. courts. Practically this makes sense as preference actions are a creation of the Bankruptcy Code and do not exist outside of them. And, while it appears to impair a foreign representative's right to pursue fraudulent conveyances under the Bankruptcy Code's provision, the action could presumably be brought under applicable state law.

Chapter 15 directs U.S. courts to cooperate with foreign courts and representatives either directly or through a trustee. This cooperation includes the broad discretion to coordinate bankruptcy proceedings across foreign borders. To date, implementation of Chapter 15 has been relatively easy, with both courts adopting a cross-border protocol regarding approval of matters in which court approval must be sought.

III. INTERPLAY BETWEEN UNITED STATES INSOLVENCY PROCEEDINGS AND CANADIAN INSOLVENCY PROCEEDINGS

Over the past several decades, it has become easier and more common for companies to have operations in both Canada and the United States. Invariably, some (and, recently, quite a few) of those companies will become insolvent and commence formal insolvency proceedings. Given that most companies carrying on business across the border generally have significant undertakings, such insolvency proceedings are often complicated and involve unique issues regarding the preservation and realization of assets and, to that end, the interplay between the Canadian and U.S. insolvency regimes.

Cross-border insolvency proceedings are nothing new, though the legislation intended to facilitate those proceedings is. Ideally, the debtor company or the secured creditors will be sufficiently knowledgeable about the differences in, and changes to, the regimes to make strategic decisions leading up to and during the filing; this paper is intended to assist with that.

There are three ways in which an insolvency proceeding in Canada or the U.S. might reach across the border with legal effect: (i) seeking discrete, one-off orders of a court in another jurisdiction; (ii) commencing concurrent proceedings in both jurisdictions; and (iii) seeking an order recognizing the foreign proceeding and the orders made in that proceeding. Various considerations will determine which of the foregoing options is appropriate in a given situation. Following is a more detailed discussion of these options and several of the matters to be considered in relation to each.

A. One-off Orders

Given our Constitution, one-off enforcement orders are nothing new for Canadian insolvency practitioners. Orders obtained in one province are not automatically enforceable in another province. Accordingly, it is not uncommon in insolvency proceedings – particularly in receivership proceedings – for the party with conduct of the proceeding to commence actions in other provinces in order to enforce one or more of the orders made in the originating province. This is often seen where a creditor in another province refuses to recognize a stay of proceedings or where a receiver seeks to sell assets in another jurisdiction free and clear of any encumbrances.

The same relief is also available to a party that wishes to enforce an order in the United States, though, practically speaking and for obvious reasons, the process does not readily assist with complicated orders or orders purporting to deal with property in the foreign jurisdiction. Undoubtedly the same option is available to Americans that wish to have certain orders entered in their jurisdiction enforced in Canada.

The most significant benefits of this option are that it is relatively quick and inexpensive. As will be seen below, concurrent proceedings and, to a lesser degree, recognition proceedings require extensive filings to initiate and, as they generally continue for the duration of the insolvency, ongoing filings and court appearances. In contrast, obtaining an enforcement order in response to a specific concern in most instances involves only the one application.

The most common use of this option is to enforce stays ordered in Canadian insolvency proceedings in the United States. A debtor company in a *Companies' Creditors Arrangement Act* ("CCAA") proceeding, a receiver or a trustee can make an application to a state court or a federal court for an order recognizing a legislated or court-ordered stay of proceedings. It has also been used to obtain dismissals of actions commenced against a debtor company in the United States where the claimant's claim was extinguished pursuant to a plan of reorganization in a CCAA proceeding.

As may be apparent, reliance upon this process is probably useful only where the debtor company has no physical assets in the other jurisdiction, but rather only a business presence such as a sales or distribution network where the creditors whose rights might be affected would likely be unsecured.

One thing for both Canadians and Americans to bear in mind when considering this option is that there is, of course, no certainty that the court to which the application for a recognition order is brought will grant the order. In that regard, reference can be made to the decision of Registrar Funduk of the Alberta Court of Queen's Bench in *Re Singer Sewing Machine Company of Canada Ltd.*³, where the court declined to recognize a stay of proceedings ordered by the Chapter 11 court which purported to extend the benefit of such stay to a wholly-owned Canadian subsidiary. Apart from good counsel work, and, where possible, bringing the application to a federal court rather than a state court, this eventuality cannot be eliminated. Accordingly, if the matter to be addressed by the enforcement order is of sufficient import, the applicant may wish to consider the advisability of commencing more formal insolvency proceedings in the other jurisdiction.

B. Concurrent Proceedings

Historically, and in many cases today, cross-border insolvencies involved concurrent insolvency proceedings. For restructurings, that means both a CCAA and a Chapter 11 proceeding. For a receivership or bankruptcy in Canada, that likely means a Chapter 7 proceeding in the United States. For Chapter 7 proceeding in the United States, that likely means a bankruptcy in Canada. Although one might expect there to be some confusion among the professionals involved in any such matter, including in terms of what falls under whose jurisdiction, practically, that is not usually a problem.

Consider first the scenario where there is a receivership or bankruptcy in Canada and a Chapter 7 proceeding in the United States. In those cases, the receiver or trustee in Canada goes about realizing on assets in Canada and the trustee in the United States goes about realizing on assets in that jurisdiction. Given that the location of assets is in most instances readily apparent, jurisdictional disputes are rare. Moreover, generally, the two parties are realizing on assets for the benefit of the same creditor or pool of creditors, and there is no reason for them not to cooperate where necessary.

³ 2000 ABQB 116

Concerns regarding concurrent liquidation proceedings are primarily to do with cost and efficiency. Apart from the fact that there are two different professionals working to realize on assets of what is usually one estate, there are two additional cost considerations. The first is the fee paid to the Chapter 7 trustee. The Chapter 7 trustee's mandate is to realize on assets for the benefit of the unsecured creditors pool. Where all of the assets in the United States are secured and of insufficient value to pay out the secured creditor(s), then the Chapter 7 trustee has little incentive to assist in the realization of those assets, and in fact the Office of the U.S. Trustee generally opposes the continuation of any case for the sole benefit of secured creditors. Accordingly, it is not uncommon for a Chapter 7 trustee to require that a portion of the proceeds of sale of the assets be retained by the bankruptcy estate.

The second cost consideration arises where there is an en bloc sale of all or part of a debtor's assets and those assets are located on both sides of the border. In that situation, there are two different professionals selling the assets and there may well be two different purchase and sale agreements. Compounding the problem for secured creditors is the issue of allocation of sale price as between assets located in Canada and the United States, which will impact on the amount to be paid to the bankruptcy estate in the U.S.

It would seem that where the assets to be realized upon are not of any unique character and where there is, as is often the case, a distinct separation between the Canadian and American assets and operations, a concurrent liquidation process is no more onerous than a single liquidation process. However, where the debtor's cross-border business is more completely integrated or where the assets are of such a nature that one professional is more suited to the realization of those assets, then it will likely be more appropriate to have one professional empowered to realize on the assets in both jurisdictions.

Concurrent proceedings also arise in restructurings. These are generally initiated in recognition of the fact that the debtor companies (it is generally a group) have significant assets and operations in both jurisdictions such that it is necessary for the debtor to seek relief, and, importantly, a stay of proceedings, under both the CCAA and Chapter 11. The proceedings might be initiated at the same time, or, more commonly and where there is urgency in the filing, separately. In most cases, one court is the "dominant" court in that the majority of the procedural and contested applications are conducted in that court, and the other is more or less asked to approve the orders of its counterpart.

Notwithstanding that there is a "dominant" court, each court retains the authority to deal with substantive matters affecting rights of parties in their jurisdiction. Of course, there will invariably be areas where jurisdictions might overlap, including in relation to matters such as the creation of judicial charges (in Canada) and carve-outs (in the United States), claims processes and sales of assets. To address this overlap, in most concurrent restructuring proceedings, the courts approve a "cross-border protocol". This is a comprehensive document, which, apart from reserving the authority of each court to deal with matters within its territorial jurisdiction, specifies which court will have primary authority to deal with matters that affect both jurisdictions.

While there is, as alluded to above, a general understanding that the non-dominant court will adopt the orders of the dominant court, that is not always the case. The secondary court

should seek to ensure that orders made by the dominant court do not conflict with its jurisdiction's insolvency laws and that creditors in their jurisdiction are not unfairly prejudiced by orders of the dominant court. To that end, the party monitoring the proceedings for the court and the unsecured creditors, being the Monitor in Canada and the Unsecured Creditors Committee in the United States, must bring any such issues to the court's attention.

Although there are undoubtedly any number of decisions of Canadian or U.S. courts concerning whether to adopt an order of the other court in a concurrent proceeding, very few such decisions are reported. Recently, however, in *Re Intertan Canada Ltd. and Tourmalet Corporation*⁴, Mr. Justice Morawetz of the Ontario Superior Court of Justice issued written reasons in which he considered the overlapping jurisdiction of the courts in concurrent CCAA-Chapter 11 proceedings. In that case, the debtors obtained approval from both the Canadian and U.S. courts to obtain DIP financing and for the creation of a DIP Lender's Charge over all the assets of the companies. The DIP Lender subsequently amended the DIP loan agreement, and obtained approval of that amendment from the U.S. court, but not the Canadian court. That amendment was, potentially, prejudicial to Canadian creditors.

The Monitor brought an application to the Ontario court seeking certain orders, including an order that no distribution of the proceeds from the sale of assets in Canada be made to the DIP Lenders pending realization of all assets in the U.S. The DIP Lender opposed the application. In his analysis, Mr. Justice Morawetz noted that the amended DIP loan agreement was approved in the U.S., but not Canada such that there were now different documents governing in each jurisdiction. Ultimately, the Court held that the DIP Lenders had elected not to seek the approval of the Ontario court at their peril, and were, accordingly, bound by the terms of the original DIP loan agreement.

The benefit of concurrent CCAA-Chapter 11 proceedings is that the debtor companies are able to avail themselves of the remedies available to them under both regimes. For example, Chapter 11 allows for the orderly liquidation of assets by the debtor, DIP financing and the cram-down of creditors in certain classes. As Canadian insolvency practitioners know, the CCAA is flexible and allows for a wide range of relief not available in a receivership or a bankruptcy, and, given the recent amendments to the CCAA, the orderly liquidation of assets by the debtor and the assignment of executory contracts. Together, the CCAA and Chapter 11 provide debtors, and through them their creditors, with a powerful set of tools for restructuring or realizing on assets.

The primary drawback with concurrent CCAA-Chapter 11 proceedings is the expense. The debtors pay for two sets of counsel, its other advisors, a Monitor and its counsel, an Unsecured Creditors Committee, its counsel and, possibly, the advisors and legal counsel of the secured creditor(s). Particularly considering the availability of Chapter 15 proceedings and proceedings pursuant to recent amendments to the CCAA and *Bankruptcy and Insolvency Act* (the "BIA") (see below), it would seem that in only the most significant cases are the costs associated with concurrent CCAA-Chapter 11 proceedings justified.

Notwithstanding the foregoing, there will undoubtedly be situations where some form of concurrent proceedings is merited. A good example of this is the recent *Linens 'n Things*

⁴ (2009), 49 C.B.R. 5th 232 (Ont. SCJ)

insolvency. This was a liquidation proceeding consisting of a Chapter 11 in the United States and a bankruptcy and receivership in Canada. Apart from avoiding the costs of a CCAA proceeding, the bankruptcy proceeding enabled the Canadian trustee to sell and assign real-property leases in most jurisdictions without the consent of the landlords. It can be expected that there will continue to be insolvency proceedings with other, unique considerations that will require the use of one or another type of concurrent insolvency processes.

C. Recognition Proceedings

The introduction of Chapter 15 into the U.S. Bankruptcy Code in 2005 provided a new means by which parties might act in furtherance of foreign insolvency proceedings within the borders of the United States. As described above, Chapter 15 enables a party to apply to have a foreign proceeding recognized as a “foreign main proceeding” or “foreign nonmain proceeding” and that party recognized as a “foreign representative” of the debtor. An order made under Chapter 15 recognizing a foreign proceeding generally gives effect to the terms of orders made in the foreign proceeding, thereby extending the reach of those orders into the United States, something which was previously unavailable except on one-off applications.

A number of benefits are immediately available upon the commencement of a Chapter 15 proceeding, including an automatic stay of proceedings and the ability to sell assets of the estate. However, from the estate’s perspective, perhaps the most practical benefit is that it grants a receiver or trustee protection from liability arising from the performance of their duties and authorizes them to realize on and sell assets located in the United States. This obviates the need to seek the separate appointment of a trustee or receiver in the United States or, worse yet, commence Chapter 11 proceedings in order to realize on assets in that jurisdiction. The cost savings are obvious.

The commencement of Chapter 15 proceedings does not, of course, mean that Canadian insolvency law will be applied south of the border. Rather, those proceedings give a Canadian debtor, receiver or trustee the authority to act in the United States in accordance with the rights given to them under the applicable legislation or order of the Canadian court. However, where substantive rights of parties in the United States, particularly creditors with interests in assets located in the United States, are affected, it is likely within the discretion of the Bankruptcy Court in a Chapter 15 proceeding to decline to adopt or approve an order of a Canadian court where the purported disposition of those rights conflicts with U.S. law.

To date, Chapter 15 has proved a useful tool for Canadian insolvency practitioners. The relief provided under it is available in CCAA proceedings, receiverships and bankruptcies, and there have been no significant restrictions placed on when that relief might be granted. It is, in comparison to the rest of U.S. Bankruptcy Code, a fairly short piece of legislation, which may be due to the fact that it is intended to be flexible and to enable U.S. bankruptcy courts to make orders suitable to a variety of different insolvency regimes provided they are in keeping with U.S. insolvency policies.

As with Chapter 15, the recent amendments to the CCAA and the BIA, which come into force on September 18, 2009, are based on the United Nations Commission on International

Trade Law's Model Law on Cross-Border Insolvency. These provisions have yet to be tested, but it can be expected that they will, for the most part, work in the same manner as Chapter 15. Canadian courts have historically shown significant flexibility in insolvency proceedings to ensure a practical and fair result; undoubtedly that flexibility will be applied to these provisions as well.

Recognition proceedings pursuant to Chapter 15 or the recent amendments to the Canadian insolvency legislation are, in the writer's view, presently the most efficient manner in which to undertake cross-border insolvency proceedings. In the case of restructurings, there are readily-recognizable cost savings in terms of professional fees and fewer claims processes. In liquidations, there is economy in having one professional oversee the realization and sale process. Moreover, to a large extent, concerns regarding overlapping jurisdictions which arise in concurrent insolvency proceedings are eliminated.

The difficulties arising in Chapter 15 proceedings are largely practical concerns encountered by the professional responsible for realizing on assets in the United States. While the primary barrier to a Canadian trustee practising in the United States has now effectively been removed, Canadian trustees are nevertheless met with difficulties not seen by their U.S. counterparts. These include the inheritance of responsibility for complicated federal and state tax filings, personal tax issues for Canadian professionals practicing in the United States and reluctance by state employment authorities to divulge information to non-residents. On top of this, Canadian professionals will be met with insolvency laws different from those they are familiar with, which will affect the manner in which a liquidation is undertaken. It should be noted that many of these difficulties can be overcome by retaining – as early as possible in the process – U.S. counsel familiar with local insolvency laws and by outsourcing matters to agents or local professionals.

As a final caveat, it should be borne in mind that Chapter 15 is new legislation and the equivalent Canadian legislation is even newer. As such, its limits have not been tested and substantive, jurisdictional issues have not been litigated. Moreover, it may later be determined that there are shortcomings with this legislation in that it is not able to address certain problems that might arise in cross-border insolvencies, which may underscore the utility of the current practice of concurrent CCAA-Chapter 11 proceedings. Undoubtedly these limits will become apparent over the coming years as more parties take advantage of these new regimes.

IV. DEFINITIONS

Understanding the Bankruptcy Lingo

341 Meeting: This is a meeting where the debtor or authorized representative(s) of the debtor is placed under oath and all creditors are allowed to ask questions. Because this takes place very early in a bankruptcy case, within 40 days of the petition date, the debtor is usually not in a position to answer questions regarding its plan to reorganize and emerge from bankruptcy.

Administrative Claims: Claims arising during the bankruptcy case which are entitled to priority over unsecured claims, including professional fees and amounts owed to creditors providing goods or services to the debtor during the bankruptcy case.

Adversary Proceeding: A law suit, commenced in the bankruptcy court by complaint. An adversary proceeding may be brought either by the debtor or a third party.

Assumption/Rejection: The decision by a debtor to either agree to be bound to the terms of an unexpired lease or executory contract or to elect to terminate such agreement.

Automatic Stay: An injunction that is immediately effective upon the filing of a voluntary bankruptcy petition or the granting of an involuntary petition, which bars any action to perfect, enforce, collect or assert a claim against the debtor or its property, with limited exceptions. The injunction is effective against all parties, with or without notice, and no action is required by the debtor or the bankruptcy court.

Avoiding Powers: The powers of the trustee (including debtor in possession) to avoid certain prepetition transfers, the most significant of which are preferences and fraudulent transfers.

Bar Date: The last day by which a creditor is entitled to file a proof of claim against the debtor. In some jurisdictions, such as Oregon, it is set automatically. In others, the debtor must file a motion seeking entry of an order setting the bar date.

Claim: Any kind of right against the debtor whatsoever, whether contingent or not, in equity or at law, etc.

Conversion: A change of a case from one chapter to another. For example, once a debtor has sold all of its assets, rather than seeking confirmation of a plan of reorganization, the debtor may convert its Chapter 11 case to a Chapter 7 liquidation case.

Cramdown: In certain circumstances, a plan of reorganization can be "crammed down" on impaired creditors who do not consent to the plan. Technical requirements are found in section 1129(b) of the Bankruptcy Code.

Creditor: Any person or entity with a claim against the debtor, including any contingent or unliquidated claims.

Creditors' Committee: The committee appointed by the U.S. Trustee's office comprised of unsecured creditors who advocate on behalf of all unsecured creditors in the case. The Creditors' Committee is authorized to retain professionals, including attorneys and accountants, and is generally given access to the debtor's business plans.

Confirmation: The approval by the bankruptcy court of a proposed plan of reorganization.

DIP: Debtor in possession, which means the debtor and existing management continue to operate. Very rarely a Chapter 11 trustee will be appointed for cause (fraud, mismanagement).

Discharge: The order entered after going through a bankruptcy proceeding that bars future actions based on prepetition (and certain other) claims. As to individual debtors, there are exceptions for the discharge of particular debts for being fraudulently incurred and certain other obligations. Corporate debtors are generally discharged from all liabilities. The discharge is enforced by a post-discharge injunction.

Disclosure Statement: The document sent to creditors and interest holders soliciting votes for approval of a Chapter 11 plan of reorganization. A disclosure statement is supposed to contain "adequate information" sufficient to allow creditors to make an informed judgment as to whether to accept or reject the plan.

Estate: All property of the debtor as of the petition date, along with proceeds, profits, etc. Courts have construed property of the estate very broadly.

Exclusivity: The period during which the debtor has the right to file and confirm a plan of reorganization.

Executory Contract: A contract that has material obligations owing on both sides. Executory contracts may be "assumed" or "rejected." Non-executory contracts are unaffected by the bankruptcy case.

Fee Application: Trustees, attorneys and other professionals may not be paid from the bankruptcy estate (whether on behalf of a debtor, creditors' committee, etc.) without court approval. Fee applications are usually filed on an interim basis until the end of the case or the representation, in which instance the fee application will be a final application.

Fraudulent Transfer, aka Fraudulent Conveyance: A transfer of an interest of property of the debtor made either with the intent to defraud creditors or for inadequate consideration.

Gap Period: The period between the filing of an involuntary proceeding and entry of an order for relief. Gap creditors are entitled to priority ahead of prepetition creditors but behind administrative creditors.

Impaired: A creditor is "impaired" by a Chapter 11 plan if the plan affects the creditor's non-bankruptcy rights in any way, except in very limited circumstances. This can be a critical

determination because unimpaired classes cannot vote (they are deemed to accept the plan) and impaired classes that do not accept the plan must be "crammed down." See also "unimpaired."

Interest Holder: Loosely defined term basically meaning one with equity interests in the debtor (e.g., shareholder, general or limited partner, etc.).

Involuntary Proceeding: Under certain circumstances, creditors or other parties in interest can commence an involuntary proceeding against a debtor. If the debtor challenges the filing, there will be litigation over the propriety of the involuntary petition.

Ipsa facto clause: Virtually every contract or lease has an "ipso facto" clause providing that the contract is automatically terminated in the event of a party's bankruptcy. These clauses are virtually always unenforceable except in cases of "personal services contracts" (there is some dispute over the breadth of that term) and of contracts to lend money.

Order for Relief: In voluntary cases, this automatically happens with the filing of the petition. For involuntary cases, it requires an actual order of the court finding that the case was appropriately filed and that the debtor belongs in bankruptcy proceedings.

Petition Date: Date that voluntary petition for relief under the Bankruptcy Code is filed.

Plan of Reorganization: The plan whereby a Chapter 11 debtor deals with all creditors and interest holders in some fashion. It is usually the penultimate document in a reorganization case and the subject of considerable negotiation with all interested parties — unsecured creditors, secured creditors, shareholders, etc. In the absence of consent of a class of creditors, the class must either be "unimpaired" or "crammed down" in a plan.

Preference: A prepetition payment made to a creditor on account of antecedent debt that enables the creditor to obtain a greater recovery than other similarly situated creditors. Generally, the preference period is 90 days for non-insiders and 1 year for insiders. There are some defenses, most significant of which are payments made in the ordinary course and that post-payment new value has been provided.

Priorities: The order of distribution of assets. In a Chapter 7 case, the order is set forth in Sections 507 and 726 and is more or less immutable. In a Chapter 11 case, the plan can alter the priorities, but only with consent or cramdown.

Proof of Claim: The document filed with the court or the claims agent describing how much is owed by the debtor to the creditor.

Schedules: Categorized schedules that list all of the assets of the debtor. (A – Personal Property; B – Real Property; C – Exempt Property (not applicable in Chapter 11 cases); D – Secured Creditors; E – Priority Creditors (employees, taxing agencies); F – Unsecured Creditors; G – Executory Contract; H – Co-Debtors)

Setoff: The ability to avoid paying a claim by "setting off" monies owed to the other party against the monies owed by the other party. Bankruptcy law generally does not affect setoff rights, although relief from stay is required to effect a setoff. For most purposes a creditor

with setoff rights is treated just like a secured creditor to the extent of its setoff rights. Note, only "mutual" debts (e.g., both prepetition) may be set off against one another.

SOFA: A series of questions that must be answered by all debtors that provides information going back up to 3 years. Includes information on income, transfers, litigation and related issues.

Trustee: A trustee is automatically appointed in Chapter 7 cases to liquidate the estate; one sometimes is appointed (after notice and a hearing) in Chapter 11 cases if the court feels there is misconduct or mismanagement on the part of the debtor in possession.

Turnover: The requirement that anyone with property belonging to the estate give it to the trustee or debtor in possession.

Unimpaired: A creditor or interest holder whose rights are not affected by a plan of reorganization is "unimpaired."

U.S. Trustee: The Office of the United States Trustee, frequently referred to as the U.S. Trustee, is a branch of the Department of Justice. The role of U.S. Trustee is to oversee the bankruptcy process to ensure that bankruptcy cases are appropriately run and managed. The U.S. Trustee also investigates bankruptcy fraud and appoints the creditors committee, Chapter 11 trustees and examiners.