Volume 1

PART I. WORKOUT STRATEGIES AND CONCERNS

CHAPTER 1. INTRODUCTION TO WORKOUT PROCESS

| | 2100111000 |
|--------|---|
| § 1:1 | Introduction |
| § 1:2 | Workout analysis |
| § 1:3 | Documentation of workout |
| § 1:4 | Analysis of workout and litigation risks |
| § 1:5 | Environmental law issues |
| § 1:6 | Securities laws issues |
| § 1:7 | Multilender credits |
| § 1:8 | Bankruptcy process |
| § 1:9 | Automatic stay |
| § 1:10 | Claims |
| § 1:11 | Use, sale or lease of assets in bankruptcy |
| § 1:12 | Financing and use of cash collateral |
| § 1:13 | Avoidance powers |
| § 1:14 | Reorganization plan |
| § 1:15 | Municipal debtor |
| § 1:16 | Creditor-in-possession, default and taking possession |
| | of personal property collateral |
| § 1:17 | Foreclosure sales and disposition |
| § 1:18 | Default and foreclosure issues for particular collate |
| § 1:19 | Regulatory and other restrictions |

CHAPTER 2. PRELIMINARY WORKOUT ANALYSIS

| § 2:1 | Introduction | | |
|----------|---|--|--|
| § 2:2 | Condition of the lender | | |
| § 2:3 | Loan document and file review | | |
| $\S 2:4$ | Analysis of documents—Trade creditor | | |
| § 2:5 | —Lender | | |
| § 2:6 | Analysis and identification of defaults | | |
| § 2:7 | —Demand obligations | | |
| § 2:8 | —Lender insecurity | | |

| § 2:9 | —Default clauses |
|-----------|--|
| § 2:10 | — Breach of covenant and warranties; falsity of |
| | representations |
| § 2:11 | — Mortgage insurance litigation concerning |
| | representations and warranties |
| § 2:12 | — —Insolvency |
| § 2:13 | ——Cross-default clauses |
| § 2:14 | ——Cure and grace provisions |
| § 2:15 | Waiver and estoppel |
| § 2:16 | Public record searches |
| § 2:17 | Verification of collateral |
| § 2:18 | Appraisal of collateral |
| § 2:19 | Identification and analysis of remedies |
| § 2:20 | Debtor's financial reports |
| § 2:21 | Analysis of financial statements |
| § 2:22 | Lender liability checklist |
| § 2:23 | Workout communications |
| § 2:24 | Accountants |
| $\S 2:25$ | Counsel |
| § 2:26 | Crisis managers |
| § 2:27 | Liquidation vs. workout |
| § 2:28 | Notice of default—Bank form |
| § 2:29 | Demand letter—Bank form—Unsecured |
| § 2:30 | ——Secured debt |
| § 2:31 | —Counsel prepared—Secured debt |

CHAPTER 3. WORKOUT OPTIONS AND DOCUMENTATION

| 0 | 2.1 | Introduction |
|----|-----|--------------|
| Λ. | | Introduction |

- § 3:2 Preworkout agreements
- § 3:3 Forbearance agreements

Appendix 3A. Prenegotiation Letter

Appendix 3B. Forbearance Agreement (Real Estate)

Appendix 3C. Forbearance Agreement (Residential Real

Estate-Development Loan)

Appendix 3D. Forbearance Agreement (Asset-Based Loans)

Appendix 3E. Forbearance Agreement-Inserts

PART II. LITIGATION AND WORKOUT RISKS

CHAPTER 4. ANALYSIS OF WORKOUT AND LITIGATION RISKS

§ 4:1 In general

I. DOCUMENTATION ERRORS

| § 4:2 | Introduction |
|--------|--|
| § 4:3 | Financing statements |
| § 4:4 | Fraudulent financing statements |
| § 4:5 | Financing statement checklist |
| § 4:6 | —Equitable subrogation |
| § 4:7 | Perfection outside of UCC |
| § 4:8 | Assignment of notes and mortgages |
| § 4:9 | Perfection outside of U.C.C. checklist |
| § 4:10 | Promissory notes |
| § 4:11 | Promissory note checklist |
| § 4:12 | Security agreements |
| § 4:13 | Assignments |
| § 4:14 | Security agreement checklist |
| § 4:15 | Subordination agreements |
| § 4:16 | Subordination agreement checklist |
| § 4:17 | Guaranties |
| § 4:18 | Guaranty checklist |

II. PROMISSORY NOTE ENFORCEMENT

| § 4:21 | Introduction |
|--------|--------------------------------------|
| - | Documentary stamp taxes |
| | Agreements to renew funding |
| _ | Alleged breach of commitment to fund |
| - | Materiality of default and waiver |
| | |

§ 4:19 Real estate documentation § 4:20 Real estate checklist

III. GUARANTY ENFORCEMENT

| § 4:26 | Introduction |
|--------|--------------------------------------|
| § 4:27 | Primary debt and subrogation |
| § 4:28 | Coverage of guaranty |
| § 4:29 | Conditions to enforcement |
| § 4:30 | Defenses |
| § 4:31 | Corporate authority |
| § 4:32 | Modifying or altering agreement |
| § 4:33 | Equal Credit Opportunity Act defense |
| § 4:34 | Avoidance powers |
| § 4:35 | Fraudulent transfers |
| § 4:36 | Preferential transfers |

IV. ARBITRATION AND OTHER OPTIONS

| § 4:37 | Waiver of jury trial |
|--------|----------------------|
| § 4:38 | Arbitration |

| § 4:39 | Arbitration, mediation and litigation |
|--------|--|
| § 4:40 | —Class actions |
| § 4:41 | Uniform Arbitration Act and constitutionality of modern arbitration statutes |
| § 4:42 | Federal Arbitration Act |
| § 4:43 | State law interplay with Federal Arbitration Act |
| § 4:44 | Arbitration of statutory claims |
| § 4:45 | Arbitration and bankruptcy |
| § 4:46 | Content of arbitration agreement |
| § 4:47 | Appeal of denial of motion to compel arbitration |
| § 4:48 | Adhesion contracts |
| § 4:49 | Effect of invalidity |
| § 4:50 | Arbitrability |
| § 4:51 | Claim of fraud in the inducement |
| § 4:52 | Change in terms |
| § 4:53 | Multistate issues |
| § 4:54 | Damages |
| § 4:55 | —Lender strategy for arbitration |

V. LENDER LIABILITY ISSUES

| § 4:56 | Introduction |
|--------|--|
| § 4:57 | Good faith and fair dealing |
| § 4:58 | Breach of fiduciary duty |
| § 4:59 | Negligence |
| § 4:60 | Control problems |
| § 4:61 | Use of business consultants |
| § 4:62 | Equitable subordination |
| § 4:63 | Nonpayment of withholding taxes |
| § 4:64 | Misrepresenting facts to debtor or third parties |
| § 4:65 | Using good customer to bail out troubled one |
| § 4:66 | Breaches of fiduciary duty and negligence |

CHAPTER 5. ENVIRONMENTAL CLAIMS

I. STATUTORY LIABILITY

| § 5:1 | Introduction |
|--------|---|
| § 5:2 | Resource Conservation and Recovery Act |
| § 5:3 | —Enforcement provisions |
| § 5:4 | —Enforcement of state programs |
| § 5:5 | —Injunctive relief |
| § 5:6 | —Private plaintiff notice requirements |
| § 5:7 | —Underground storage tanks |
| § 5:8 | ——State regulation of underground storage tanks |
| § 5:9 | ——Liable parties |
| § 5:10 | —Property owned exclusion |
| | |

TABLE OF CONTENTS

| § 5:11 | —EPA UST Lender Liability Rule and safe harbor |
|------------------|---|
| § 5:12 | —Underground storage tanks—New tank |
| e F.10 | requirements |
| § 5:13 | — Existing tanks |
| § 5:14 | ——Closure of tanks |
| § 5:15 | ——Response to leaking tanks |
| § 5:16 | ——Petroleum as hazardous waste |
| § 5:17 | —Lender options on gasoline contaminated sites |
| § 5:18 | —State trust funds |
| § 5:19 | —Federal leaking underground storage tank trust fund |
| § 5:20 | —Indemnification agreements |
| § 5:21 | —Petroleum tanks; financial responsibility requirements |
| § 5:22 | Comprehensive Environmental Response, |
| | Compensation, and Liability Act (CERCLA or Superfund) |
| § 5:23 | —Small Business Liability Relief and Brownfields |
| | Revitalization Act |
| § 5:24 | —Injunctive relief |
| § 5:25 | —Responsible parties |
| § 5:26 | —Retroactivity |
| § 5:27 | —Private contractual liability |
| § 5:28 | —Indemnification agreement interpretation |
| § 5:29 | —Disposal |
| § 5:30 | —Useful product doctrine |
| § 5:31 | —Response costs |
| § 5:32 | —National contingency plan |
| § 5:33 | —Environmental protection agency response actions |
| § 5:34 | —Remedial action |
| § 5:35 | —Private plaintiffs |
| § 5:36 | —Preemption of public nuisance recovery theories by |
| 0 -1 | states and private parties |
| § 5:37 | —Limitations period |
| § 5:38 | —Strict liability |
| § 5:39 | —Joint and several liability |
| § 5:40 | —Officer, director and shareholder liability |
| § 5:41 | —Successor corporate liability |
| § 5:42 | —Federal and state governmental liability |
| § 5:43 | —Financial institution liability |
| § 5.46 § 5:44 | ——Ownership of contaminated real property |
| - | — —Control over borrower |
| § 5:45 | |
| § 5:46 | — — Ability to affect disposal decisions |
| § 5:47 | ——EPA lender liability rule |
| § 5:48 | —Post fleet factors and EPA lender liability rule cases |
| § 5:49 | —Federal lender liability legislation |
| § 5:50 | — —Fiduciary or trustee liability |

§ 5:51 —Federal fiduciary protection
§ 5:52 —Statutory guidance for fiduciaries
§ 5:53 —Trust provisions checklist
§ 5:54 —Defenses to CERCLA liability
§ 5:55 —Petroleum exclusion
§ 5:56 — Used oil
§ 5:57 —EPA guidelines for de minimis settlements with landowners

—Prospective purchaser agreements with EPA

II. FEDERAL AND STATE LIENS, TRANSFER RESTRICTIONS AND NOTICE REQUIREMENTS

Deductibility of cleanup expense as business expenses

- § 5:60 Federal liens
- § 5:61 Alaska

§ 5:58

§ 5:59

- § 5:62 Arizona
- § 5:63 Arkansas
- § 5:64 California
- § 5:65 Connecticut
- § 5:66 Georgia
- § 5:67 Illinois
- § 5:68 Indiana
- § 5:69 Iowa
- § 5:70 Kentucky
- § 5:71 Louisiana
- § 5:72 Maine
- § 5:73 Maryland
- § 5:74 Massachusetts
- § 5:75 Michigan
- § 5:76 Minnesota
- § 5:77 Montana
- § 5:78 New Hampshire
- § 5:79 New Jersey
- § 5:80 Ohio
- § 5:81 Oregon
- § 5:82 Pennsylvania
- § 5:83 Tennessee
- § 5:84 Texas
- § 5:85 Virginia
- § 5:86 State restrictions on transfer of contaminated real property
- § 5:87 Real estate notice provisions

III. INSURANCE COVERAGE

§ 5:88 Introduction

xviii

| § 5:89 | Comprehensive general liability policies |
|--------|--|
| § 5:90 | —Occurrence requirement |
| § 5:91 | —Interpretation of "damages" |
| § 5:92 | —Pollution exclusion clauses |
| § 5:93 | Title insurance |
| § 5:94 | Environmental lien endorsement |

IV. ENVIRONMENTAL LAWS AND BANKRUPTCY

| Introduction |
|---|
| Effect of automatic stays |
| Exceptions to automatic stays |
| Abandonment of contaminated property |
| Bankruptcy trustee liability |
| Assessment of cleanup costs against secured creditors |
| Cleanup costs as administrative expenses |
| Environmental expenses as "claims" under |
| Bankruptcy Code |
| —Definition of claim |
| —Claims for contribution |
| —Discharge of environmental claims |
| |

V. RISK MINIMIZATION

| § 5:106 | Introduction |
|---------|---|
| § 5:107 | Site history |
| § 5:108 | Regulatory review |
| § 5:109 | Securities and exchange commission required disclosures |
| § 5:110 | Underground storage tanks |
| § 5:111 | Adjacent sites |
| § 5:112 | Industry familiarity |
| § 5:113 | Environmental audits |
| § 5:114 | —Access onto premises |
| § 5:115 | Selective foreclosure |
| § 5:116 | —ASTM standard practices for environmental |
| | assessments |
| § 5:117 | —EPA all appropriate rule |
| § 5:118 | —FDIC guidelines for environmental risk program |
| § 5:119 | —Selection of environmental engineer |
| § 5:120 | —Phase I, II and III audits |
| § 5:121 | Discovery of hazardous substances |
| § 5:122 | Lender disclosure obligation |
| § 5:123 | Loan documentation |
| § 5:124 | —Sample provision for commitment letters |
| § 5:125 | —Sample provisions for loan and security agreements, mortgages and owner's affidavits |
| § 5:126 | Sample environmental questionnaire I |

| § 5:127 § 5:128 | | le environmental questionnaire II er environmental insurance |
|--------------------|-----|---|
| Appendix | 5A. | CERCLA Definitions |
| Appendix | 5B. | Abatement Actions Under CERCLA |
| Appendix | 5C. | Liability Under CERCLA |
| Appendix | 5D. | Civil Penalties and Awards Under CERCLA |
| Appendix | 5E. | Settlements Under CERCLA |
| Appendix | 5F. | Underground Storage Tank Indemnification Agreement—Buyer and Lender Protection |

CHAPTER 6. SECURITIES LAWS

- § 6:1 Introduction
- § 6:2 Pleading standards for all actions

I. DEFINITION OF "SECURITY"

- § 6:3 In general Economic reality test § 6:4 § 6:5 Promissory notes § 6:6 Prime bank notes § 6:7 Loan participations § 6:8 Loan commitments § 6:9 Guarantees § 6:10 Certificates of deposit Sales of condominiums with rental arrangements § 6:11
- § 6:12 Derivatives

 II. REGISTRATION STATEMENT PROBLEMS
- § 6:13 Scope and purpose of Section 11
- § 6:14 Plaintiffs
- § 6:15 Liable parties
- § 6:16 Materiality
- § 6:17 Reliance
- § 6:18 Defenses
- § 6:19 Damages

III. SALE OF UNREGISTERED SECURITIES

- § 6:20 Scope of Section 12(1)
- § 6:21 Interstate commerce or mails requirement
- § 6:22 Privity
- § 6:23 Exemptions
- § 6:24 —Financial institutions
- § 6:25 —Intrastate offerings
- § 6:26 —Private offerings

- § 6:27 Small issues
- § 6:28 Resales

IV. SECTION 12(2) FRAUD IN SALE OF SECURITIES

- § 6:29 Scope of Section 12(2)
- § 6:30 Lender as "Seller" of securities

V. SECTION 10(B) AND RULE 10B-5 ANTIFRAUD PROVISIONS

- § 6:31 Introduction
- § 6:32 Rule 10b-5
- § 6:33 Privity
- § 6:34 Deceptive practices
- § 6:35 Materiality
- § 6:36 Statutory safe harbor for forward looking statements
- § 6:37 Scienter
- § 6:38 "In connection with" purchase or sale requirement
- § 6:39 Reliance
- § 6:40 Due care
- § 6:41 Damages
- § 6:42 Contribution and proportionate liability

VI. AIDING AND ABETTING LIABILITY

- § 6:43 Elements
- § 6:44 Supreme court rejection of aiding and abetting liability
- § 6:45 Post-central bank liability for secondary parties
- § 6:46 SEC authority over aiding and abetting
- § 6:47 —Primary violation
- § 6:48 —Scienter
- § 6:49 —Substantial assistance

VII. CONTROL PERSON LIABILITY

- § 6:50 Introduction
- § 6:51 Elements of control
- § 6:52 Insider Trading and Securities Fraud Enforcement Act

VIII. LENDER NONDISCLOSURE OF MATERIAL INFORMATION

- § 6:53 Introduction
- § 6:54 Disclosure of regulatory actions
- § 6:55 Disclosure of loan losses

IX. CRIMINAL VIOLATIONS

§ 6:56 Introduction

| § | 6:57 | Willfulness |
|---|------|-------------|
| _ | | |

- § 6:58 No knowledge defense
- § 6:59 Criminal intent
- § 6:60 Criminal referral
- § 6:61 Tactical considerations

X. DEVELOPMENT OF NEW PRODUCTS

§ 6:62 Retail repo agreements

XI. RISK MINIMIZATION

- § 6:63 Loans
- § 6:64 Reckless dissemination of information
- § 6:65 Loan loss reserves
- § 6:66 Control person
- § 6:67 Retail repo agreements
- Appendix 6A. Definition of Security Under Securities Act of 1933 (15 U.S.C.A. Section 77b(a)(1))
- Appendix 6B. Prohibitions Re Interstate Commerce and Mails Under Securities Act of 1933 (15 U.S.C.A. Section 77e)
- Appendix 6C. Manipulative and Deceptive Devices Under Securities Exchange Act of 1934 (15 U.S.C.A. Section 78j)
- Appendix 6D. Employment of Manipulative and Deceptive Devices Under Sec Rule 10b-5 (17 C.F.R. Section 240.10b-5)
- Appendix 6E. State Securities Law Claims

CHAPTER 7. MULTILENDER TRANSACTIONS

§ 7:1 Introduction

I. JOINT LOANS AND PARTICIPATIONS

- § 7:2 Structural characteristics
- § 7:3 Allocating credit risk
- § 7:4 Legal lending limit considerations
- § 7:5 Legal lending limit changes due to reduction of bank's capital position
- § 7:6 Dodd Frank—Implications for legal lending limits
- § 7:7 —Loan participations and swaps

II. CREDITOR-DEBTOR RELATIONSHIP

§ 7:8 Syndicate and debtor

xxii

- § 7:9 —Security interests in debtor's collateral § 7:10 Rights of direct action or setoff
- § 7:11 —Dealing with loan
- § 7:12 —Excess or nonparticipated loan
- § 7:13 True sale issues and legal lending limit

III. INTERCREDITOR RELATIONSHIP

- § 7:14 Lead and participants
- § 7:15 —Sale or loan
- § 7:16 Substitution of lead lender
- § 7:17 Lead and participants—Secured or unsecured debt
- § 7:18 —Sales and resulting rights
- § 7:19 —Recourse or buyout transactions
- § 7:20 Control of debt relationship
- § 7:21 —Maximum loan and exposure limits
- § 7:22 —Independent loans
- § 7:23 —Dealing with default and workouts
- § 7:24 —Lending into default
- § 7:25 —Modifying and servicing loans
- § 7:26 Diversity jurisdiction
- § 7:27 Bankruptcy of lead lender
- § 7:28 Appointment of receiver or conservator for lead lender
- § 7:29 —Powers of FDIC as receiver or conservator
- § 7:30 —Stay of litigation
- § 7:31 —Jurisdiction over claims against insolvent banks
- § 7:32 —Liability of FDIC and insolvent bank
- § 7:33 —Setoff by FDIC
- § 7:34 Obligations of lead lender to participants
- § 7:35 —Conflicts of interest
- § 7:36 —Fiduciary and ordinary care duties
- § 7:37 —Loan collection
- § 7:38 —Disclosures and fraud
- § 7:39 —Misrepresentation

IV. SELECTED LOAN PARTICIPATION AGREEMENT PROVISIONS

- § 7:40 Loan participant rights in event of default by lead or originating bank
- § 7:41 Substitution of originating bank
- § 7:42 Originating bank's extension of additional credit to borrower
- § 7:43 Independent investigation of credit by participants; non-recourse sale
- § 7:44 Administration of credit
- § 7:45 —Deferral to majority on interests but with

| | originating bank safe harbor for actions under exigent circumstances |
|--------|--|
| | O Company of the comp |
| § 7:46 | Sale of participation interests; right of first refusal |
| § 7:47 | Due diligence by participant; notice by originating bank of termination of credit relationship |
| § 7:48 | Sharing of losses and expenses |
| § 7:49 | Default by borrower and disposition of collateral |
| § 7:50 | Grant of further participations by originating bank |
| | |
| | |

Volume 2

PART III. BANKRUPTCY CONSIDERATIONS

CHAPTER 8. BANKRUPTCY PROCESS

| OIII | i i Ett o. Diminitel let i itoe |
|--------|---|
| § 8:1 | Introduction |
| § 8:2 | Bankruptcy Code |
| § 8:3 | Federal rules of bankruptcy procedure |
| § 8:4 | Bankruptcy options—Chapter 11 |
| § 8:5 | —Chapter 7 |
| § 8:6 | —Other chapters |
| § 8:7 | Commencement of bankruptcy—Voluntary cases |
| § 8:8 | —Involuntary cases |
| § 8:9 | — Initiating involuntary case |
| § 8:10 | — —Adjudication |
| § 8:11 | — — Dismissal |
| § 8:12 | Consequences of bankruptcy filing |
| | |

CHAPTER 9. AUTOMATIC STAY

| CHAI | FIER 9. AUTUMATIC STAT |
|--------|--|
| § 9:1 | Introduction |
| § 9:2 | Overview of automatic stay |
| § 9:3 | —Oral and written demand notices |
| § 9:4 | —Litigation |
| § 9:5 | -Foreclosures and enforcement of judgments |
| § 9:6 | —Creation or perfection of liens |
| § 9:7 | —Setoff |
| § 9:8 | —Administrative freeze |
| § 9:9 | —Recoupment |
| § 9:10 | —Checks and negotiable instruments |
| § 9:11 | —Criminal prosecution |
| § 9:12 | —Police and regulatory actions |
| § 9:13 | Consequences of violating stay |
| § 9:14 | Grounds for relief from stay |
| § 9:15 | Commencement of action |
| | |

- § 9:16 Time limitations
- § 9:17 Scope of hearing
- § 9:18 Burden of proof
- § 9:19 Termination of stay

CHAPTER 10. CLAIMS

- § 10:1 Overview of claims
- § 10:2 Secured claims
- § 10:3 Administrative expense claims
- § 10:4 Priority claims
- § 10:5 Unsecured claims
- § 10:6 Subordination
- § 10:7 Trading claims
- § 10:8 Restrictions on trading claims

CHAPTER 11. USE, SALE OR LEASE OF ASSETS

- § 11:1 Introduction
- § 11:2 Overview
- § 11:3 Use, sale or lease of property of estate in ordinary course of business—Section 363(c)
- § 11:4 Use, sale or lease of property of estate other than in ordinary course of business—Section 363(b)
- § 11:5 Adequate protection
- \$11:6 Sales free and clear of interest of entities—Section 363(f)
- § 11:7 —Sale of substantially all assets outside ordinary course of business—Section 363(b)
- § 11:8 —Secured creditor's right to bid
- § 11:9 —Procedure
- § 11:10 ——Motion
- § 11:11 ——Notice
- § 11:12 ——Objections
- § 11:13 ——Hearing
- § 11:14 ——Evidence
- § 11:15 ——Order
- § 11:16 —Conducting sale
- § 11:17 —Mechanics of sale process
- § 11:18 —Auctioneers or professionals
- § 11:19 —Sales tax
- § 11:20 —Recovery of costs and expenses of sale
- § 11:21 Safe Harbor Protection of Section 363(m)
- § 11:22 —Definition of "good faith"
- § 11:23 —Stay of judgment

CHAPTER 12. FINANCING AND USE OF CASH COLLATERAL

| § | 12:1 | Introduction |
|---|-------|---|
| § | 12:2 | Overview of 11 U.S.C.A. § 364 |
| § | 12:3 | Unsecured credit in ordinary course of business— Section 364(a) |
| § | 12:4 | —Ordinary course of business requirement |
| § | 12:5 | —Actual, necessary expenses of preserving estate |
| § | 12:6 | Unsecured credit outside of ordinary course of business (Section 364(b)) |
| § | 12:7 | Credit with super-super-priority claim status, junior liens on encumbered assets and/or liens on unencumbered assets (Section 364(c)) |
| § | 12:8 | —Super-super-priority claim status under Section $364(c)(1)$ |
| § | 12:9 | —Liens granted under Section 364(c)(2) and (3) |
| | 12:10 | Credit secured by senior or equal liens on encumbered property (Section 364(d)) |
| 8 | 12:11 | —Inability to obtain financing on other terms |
| | 12:12 | —Adequate protection of existing lienholders |
| | 12:13 | Drafting and negotiating financing agreements and orders |
| Ş | 12:14 | Cross-collateralization |
| Š | 12:15 | Cross-superprioritization |
| Š | 12:16 | "Dive" provision |
| | 12:17 | Termination of stay |
| | 12:18 | Provisions with respect to professional fees |
| | 12:19 | Provisions concerning 11 U.S.C.A. 506(c) |
| | 12:20 | Provisions with respect to the impact on trustee |
| Ş | 12:21 | Provisions with respect to financing statements |
| Š | 12:22 | Provisions regarding guarantors |
| Š | 12:23 | Provisions with respect to third-party contracts |
| Š | 12:24 | Checklist of debtor-in-possession terms |
| § | 12:25 | Overview of procedure (Federal Rules of Bankruptcy Procedure 4001) |
| § | 12:26 | —Emergency financing |
| § | 12:27 | Safe harbor under Section 364(e) and stays on appeal |
| § | 12:28 | Debtor-in-possession's use of cash collateral |
| § | 12:29 | —Meaning of cash collateral |
| § | 12:30 | —Agreements to use of cash collateral |
| § | 12:31 | — — Motion |
| § | 12:32 | ——Notice and hearing |
| | 12:33 | ——Points of negotiation |
| | 12:34 | Opposition to use of cash collateral |
| | 12:35 | —Procedural issues |
| | 12:36 | —Standard for court authority to use cash collateral |
| | | |

| § 12:37 | —Valuation of secured creditor's interest and collateral |
|----------|---|
| ° 10 00 | |
| § 12:38 | —Value or equity cushion |
| § 12:39 | —Evaluation of threat or risk to creditor's interest |
| § 12:40 | —Periodic payments |
| § 12:41 | —Additional and replacement liens |
| § 12:42 | —Restrictions upon use of cash collateral |
| § 12:43 | Consequences of unauthorized use of cash collateral |
| Appendix | 12A. Motion for Order Authorizing Debtor to Obtain Secured Financing, Grant Security Interests and to Accord Priority Status Pursuant to 11 U.S.C.A. § 364(c)(1), and for Modification of Automatic Stay |
| Appendix | 12B. Order Authorizing Debtor-in-Possession to Obtain Financing, Grant Security Interests and Accord Priority Status Pursuant to 11 U.S.C.A. § 364(c), Giving Notice of Final Hearing Pursuant to Federal Rules of Bankruptcy Procedure 4001(c)(2) and Modifying Automatic Stay |
| Appendix | 12C. Motion for Order Authorizing Debtor to Obtain Secured Financing, Grant Senior and Priming Liens Pursuant to 11 U.S.C.A. § 364(d) and to Accord Priority Status Pursuant to 11 U.S.C.A. § 364(c)(1), and for Modification of Automatic Stay |
| Appendix | 12D. Order and Notice of Hearing on Debtor's Motion to Obtain Secured Financing, Grant Senior and Priming Liens Pursuant to 11 U.S.C.A. § 364(d), and to Accord Priority Status Pursuant to 11 U.S.C.A. § 364(c)(1), and for Modification of Automatic Atay |
| Appendix | 12E. Order Authorizing Debtor-in-Possession to Obtain Secured Financing, Grant Senior and Priming Liens Pursuant to 11 U.S.C.A. § 364(d) and Accord Priority Status Pursuant to 11 U.S.C.A. § 364(c)(1), and Modifying Automatic Stay |
| Appendix | 12F. Debtor's Motion for Use of Cash Collateral and for a Preliminary Hearing |
| Appendix | 12G. Consent Order Allowing Use of Cash Collateral and Providing Adequate Protection |

CHAPTER 13. AVOIDANCE POWERS

§ 13:1 Introduction

I. FRAUDULENT CONVEYANCES UNDER SECTION 548

| § 13:2 | General structure and threshold elements of section 548 |
|---------|---|
| £ 19.9 | —Transfer |
| § 13:3 | 110110101 |
| § 13:4 | |
| § 13:5 | 1 1 0 |
| § 13:6 | |
| § 13:7 | —Nature of intent |
| § 13:8 | —Proof of intent |
| § 13:9 | Constructive fraud |
| § 13:10 | —Reasonably equivalent value |
| § 13:11 | —Insolvency |
| § 13:12 | ——Debts |
| § 13:13 | ——Property |
| § 13:14 | — —Fair valuation |
| § 13:15 | — —Asset valuation—Commercial loans |
| § 13:16 | — — —Installment loan interest |
| § 13:17 | |
| § 13:18 | — — —Contingent claims |
| § 13:19 | |
| § 13:20 | • |
| § 13:21 | - |
| § 13:22 | |
| § 13:23 | |
| § 13:24 | |
| § 13:25 | |
| § 13:26 | · · |
| § 13:27 | |
| § 13:28 | —Debts beyond ability to pay |
| 2 TO.40 | —Devis beyond admity to pay |

II. FRAUDULENT CONVEYANCES UNDER SECTION 544(B)

§ 13:31 Section 544(b)—Alternative power of avoidance

III. LIABILITY OF TRANSFEREE

Special rules for partnerships

Transfer to benefit insiders

§ 13:32 Status of transferee
§ 13:33 —Transferee
§ 13:34 —Initial transferee
§ 13:35 —For whose benefit
§ 13:36 —Immediate or mediate transferee
§ 13:37 —Limitations on trustee's recovery
§ 13:38 —Good faith transferee

§ 13:29 § 13:30

- § 13:39 — Value § 13:40 — — Good faith
- § 13:41 ——Knowledge
- § 13:42 ——Liens on transferred property

IV. PROCEDURAL MATTERS

- § 13:43 Standing
- § 13:44 Commencement, jurisdiction and venue
- § 13:45 Relief available
- § 13:46 Statute of limitations
- § 13:47 Right to jury trial

V. PREFERENTIAL TRANSFERS

- § 13:48 Introduction
- § 13:49 Transfer
- § 13:50 Elements of preference
- § 13:51 Exceptions

CHAPTER 14. REORGANIZATION PLAN

- § 14:1 Overview
- § 14:2 Eligibility for filing plan
- § 14:3 Classification of claims and interests
- § 14:4 Contents of plan
- § 14:5 Modification
- § 14:6 Disclosure statement
- § 14:7 Requirements for confirmation
- § 14:8 Cram down
- § 14:9 Confirmation hearing
- § 14:10 Order of confirmation
- § 14:11 Subchapter V Bankruptcy—Introduction
- § 14:12 —Content and timing of plans
- § 14:13 —Confirmation
- § 14:14 —Discharge

CHAPTER 15. MUNICIPAL DEBTOR

- § 15:1 Introduction
- § 15:2 Eligibility for relief under Chapter 9
- § 15:3 Filing of petition in Chapter 9 case
- § 15:4 Dismissal of Chapter 9 case
- § 15:5 State powers and limitations
- § 15:6 Limitations on jurisdiction and powers of bankruptcy court in Chapter 9 case
- § 15:7 Operation of municipality during Chapter 9 case
- § 15:8 Automatic stay
- § 15:9 Creditors

| § 15:10 | —Notice to creditors |
|----------|--|
| § 15:11 | Creditors' committees |
| § 15:12 | Claims for postpetition interest |
| § 15:13 | Obtaining credit during Chapter 9 case |
| § 15:14 | Powers of municipality during Chapter 9 case |
| § 15:15 | —Assumption, rejection or assignment of executory contracts and unexpired leases |
| § 15:16 | Rejection of collective bargaining agreements |
| § 15:17 | Setoffs |
| § 15:18 | Filing of Chapter 9 plan |
| § 15:19 | Contents of Chapter 9 plan |
| § 15:20 | Priority of payment |
| § 15:21 | Disclosure statement |
| § 15:22 | USA Patriot Act |
| § 15:23 | Acceptance of Chapter 9 plan |
| § 15:24 | Confirmation of Chapter 9 plan |
| § 15:25 | Rights of dissenting, impaired classes in Chapter 9 |
| | case |
| § 15:26 | Effect of confirmation |
| § 15:27 | Dismissal |
| § 15:28 | Bankruptcy court's continuing jurisdiction |
| § 15:29 | Alternatives to Chapter 9 |
| Appendix | 15A. Voluntary bankruptcy petition for county |
| Appendix | 15B. Bankruptcy Reform Act of 1994—Amendment to 11 U.S.C.A. § $109(C)(2)$ |
| Appendix | 15C. Florida Statutes |

PART IV. CREDITOR RIGHTS AND RESPONSIBILITIES INVOLVING COLLATERAL

CHAPTER 16. CREDITOR-IN-POSSESSION, DEFAULT AND TAKING POSSESSION OF PERSONAL PROPERTY COLLATERAL

§ 16:1 Introduction

I. CREDITOR-IN-POSSESSION

| 8 16.9 | Overview |
|--------|---|
| 8 10.2 | Overview |
| § 16:3 | Allocation of costs and risks |
| § 16:4 | Reasonable care in preservation |
| § 16:5 | —Preservation of market value by sale |
| § 16:6 | -Protection of rights against third parties |
| § 16:7 | —Contracts and reasonable care |

II. DEFAULT

| § 16:8 | Minimum requirements and function of default |
|--------|--|
| | provisions |
| 0 100 | D 0 1: 1 : 1 0 ::: |

- § 16:9 Default and contract definition
- § 16:10 Covenants—Purpose and relationship to default and acceleration
- § 16:11 Performance issues—Waiver and estoppel

III. TAKING POSSESSION OF PERSONAL PROPERTY COLLATERAL

- § 16:12 General considerations and options
- § 16:13 Judicial foreclosure proceedings
- § 16:14 Nonjudicial and self-help repossession
- § 16:15 Voluntary surrender and postdefault agreement
- § 16:16 Intangibles and setoff rights
- § 16:17 Tangibles and breach of peace
- § 16:18 Drafting repossession clauses
- § 16:19 Assembly and delivery obligations of debtor
- § 16:20 Consent to entry
- § 16:21 Handling other property
- § 16:22 Repossession and third parties

Appendix 16A. OCGA § 13-4-4. Effect of Mutual Departure From Contract Terms

Appendix 16B. Contractual Provision

CHAPTER 17. FORECLOSURE SALES AND DISPOSITION

- § 17:1 Introduction
- § 17:2 Right to redeem—Overview
- § 17:3 —Timing and notice
- § 17:4 —Tender of all obligations
- § 17:5 Strict foreclosure and compulsory disposition
- § 17:6 —Creditor's purpose and retail sales
- § 17:7 —Delay and failure to sell
- § 17:8 —Consumer cases
- § 17:9 —Notice and objection
- § 17:10 —Strict foreclosure under Revised Article 9
- § 17:11 Managing and monitoring sale process
- § 17:12 Private or public sale
- § 17:13 Reasonableness and good faith
- § 17:14 Price—Proceeds or procedures tests
- § 17:15 —Value comparisons—Market choice
- § 17:16 —Proximate resale for profit
- § 17:17 —Minimum bid or reserve auctions

| § 17:18 | Price and fraudulent conveyance liability |
|---------|--|
| § 17:19 | Focus, content and amount of advertisement |
| § 17:20 | Private solicitation |
| § 17:21 | Fixup and repair |
| § 17:22 | Notice requirements |
| § 17:23 | —Content issues |
| § 17:24 | —Form and transmission of notice |
| § 17:25 | —Timing and receipt issues |
| § 17:26 | —When notice not required |
| § 17:27 | —Parties entitled to notice |
| § 17:28 | Timing of sale and delay |
| § 17:29 | Purchasers' rights and discharge of liens |
| § 17:30 | Distribution of proceeds and surplus |
| § 17:31 | Debtor's remedies against creditor |
| § 17:32 | Deficiency claims |
| § 17:33 | Agreements governing foreclosure |
| § 17:34 | —General predefault agreements |
| § 17:35 | —Predefault agreements and guarantors |
| § 17:36 | —Postdefault agreements and waivers |
| § 17:37 | Unsecured creditor's rights against secured creditor |

CHAPTER 18. DEFAULT AND FORECLOSURE ISSUES FOR PARTICULAR COLLATERAL

Secured creditor's rights against third parties

§ 18:1 Introduction

I. EQUIPMENT LOANS

- § 18:2 Sale and repossession issues
- § 18:3 Immobilization and use of premises

II. MOTOR VEHICLE

- § 18:4 Conveying title
- § 18:5 Auction markets and notice

III. AIRCRAFT

§ 18:6 Default and foreclosure
§ 18:7 —Inspection of property
§ 18:8 —Advertising and brokerage
§ 18:9 Foreclosure title transfers
§ 18:10 Bankruptcy Code and rules

IV. VESSELS

§ 18:11 Overview

xxxii

| § 18:12 | General issues |
|---------|----------------|
| 0 10 10 | T |

- § 18:13 Private foreclosure actions
- § 18:14 Judicial foreclosures and deficiencies
- § 18:15 Bankruptcy Code and rules

V. ACCOUNTS AND CONTRACTS

- § 18:16 Events of default and deficiencies
- § 18:17 Lender liability and notice
- § 18:18 Postdefault collections
- § 18:19 —Bulk sale of accounts
- § 18:20 Bankruptcy and cash collateral

VI. CHATTEL PAPER

- § 18:21 Customer default
- § 18:22 Sales by paper holder—Recourse rights
- § 18:23 Reselling through dealer
- § 18:24 Dealer default and termination

VII. NOTES AND CERTIFICATES

- § 18:25 Default and promissory notes
- § 18:26 Default and certificates of deposit

VIII. INVENTORY

- § 18:27 Right to terminate and notice
- § 18:28 Initial steps of foreclosure
- § 18:29 Wind-down procedures
- § 18:30 Methods of sale
- § 18:31 Automatic stay

IX. INTELLECTUAL PROPERTY

- § 18:32 Termination and license default
- § 18:33 Sale methodology
- § 18:34 Collateral assignments and sales
- § 18:35 Secrecy in reselling

X. INVESTMENT SECURITIES

- § 18:36 Defining default
- § 18:37 Notice and acceleration
- § 18:38 Sales in changing market
- § 18:39 Warranties on sale of securities
- § 18:40 Securities registration issues

Appendix 18A. Aircraft Equipment and Vessels (11 U.S.C.A. § 1110)

Appendix 18B. Ship Mortgage Remedy Provision

Appendix 18C. Maintenance of Collateral

PART V. REGULATORY RESTRICTIONS ON LENDERS

CHAPTER 19. REGULATORY RESTRICTIONS ON LENDERS

| RESI | RICTIONS ON LENDERS |
|-------------|--|
| § 19:1 | Introduction |
| § 19:2 | Regulation of commercial banks |
| § 19:3 | Regulation of savings associations |
| § 19:4 | Proposals to restructure the regulation of commercial banks and savings associations |
| § 19:5 | Accounting principles |
| § 19:6 | Nonaccruing loans and accounting standards |
| § 19:7 | Taking title to real property |
| § 19:8 | Troubled debt restructuring |
| § 19:9 | Reporting of nonaccrual loans |
| § 19:10 | Allowance for loan and lease losses—Accounting rules |
| § 19:11 | Current expected credit loss model |
| § 19:12 | Complex structured finance transactions |
| § 19:13 | Responses to financial crisis |
| § 19:14 | —The Emergency Economic Stabilization Act of 2008 |
| § 19:15 | — —Executive compensation limitations |
| § 19:16 | —Financial Stabilization Plan |
| § 19:17 | — —Financial Stability Trust |
| § 19:18 | — — Public-Private Investment Fund |
| § 19:19 | ——Consumer Business Initiative (TALF) |
| § 19:20 | ——Housing support and foreclosure prevention |
| § 19:21 | ——Small business and community lending initiative |
| § 19:22 | — —Other conditions |
| § 19:23 | —Homeowner litigation arising under the Home Affordability Modification Program |
| § 19:24 | —Temporary Liquidity Guarantee Program |
| § 19:25 | —Money market funds |
| § 19:26 | —SEC actions |
| § 19:27 | —Fraud Enforcement and Recovery Act of 2009 |
| § 19:28 | —Helping Families Save their Homes Act of 2009 |
| § 19:29 | —FDIC insurance coverage |
| § 19:30 | Financial stability oversight council |
| § 19:31 | Orderly liquidation authority |

Table of Laws and Rules

Table of Cases

Index