

# Table of Contents

## CHAPTER 1. CORPORATE COUNSEL'S PRIMER ON BANKRUPTCY

- § 1:1 Introduction
- § 1:2 —Actions against the debtor and its assets are stayed
- § 1:3 —Debtor assumes status of debtor-in-possession
- § 1:4 —Formation of creditors' committees
- § 1:5 —Negotiation and preparation of plan of reorganization
- § 1:6 Preliminary issues for the debtor
- § 1:7 —Initial considerations
- § 1:8 —Authority to file petition
- § 1:9 —Advising the board of directors
- § 1:10 — —Management issues—Who will be running the business after the Chapter 11 filing?
- § 1:11 — — —Is there a potential for a change of control?
- § 1:12 — — —Possible conflicts between individuals and the company
- § 1:13 — —Operation issues—When must the company stop incurring trade credit?
- § 1:14 — — —After the filing, to what extent can management run the business to try to maximize the return to the shareholders?
- § 1:15 — — —What about offers to buy the company's assets?
- § 1:16 — —Administration issues—What if the books are not very good?
- § 1:17 — — —How do you get your house in order before the filing?
- § 1:18 The automatic stay—Purpose of the automatic stay
- § 1:19 —Activities affected by the stay
- § 1:20 — —Commencement or continuation of any proceeding on prepetition debts
- § 1:21 — —Enforcement of a prepetition judgment
- § 1:22 — —Attempts to obtain possession of property
- § 1:23 — —Acts to create, perfect, or enforce a lien against property of the estate
- § 1:24 — —Acts to create, perfect, or enforce a lien against property of the debtor
- § 1:25 — —Acts to collect, assess, or recover prepetition claims
- § 1:26 — —Setoff
- § 1:27 — —Tax Court proceedings

- § 1:28 —Exceptions to the stay
- § 1:29 —Relief from the stay
- § 1:30 —Adequate protection
- § 1:31 — —Cash payments
- § 1:32 — —Additional or replacement lien
- § 1:33 — —Indubitable equivalent
- § 1:34 —Termination
- § 1:35 Preferences
- § 1:36 —Definition
- § 1:37 — —Transfer of the debtor’s interest in property
- § 1:38 — —To or for the benefit of a creditor
- § 1:39 — —For or on account of an antecedent debt
- § 1:40 — —When the debtor was insolvent
- § 1:41 — —Made within the ninety-day (one year for an insider) time requirement
- § 1:42 — —Enabled the creditor to receive more than it would have received in a liquidation
- § 1:43 —Avoiding the transfer
- § 1:44 —Exceptions—Contemporaneous exchange for new value
- § 1:45 — —Payment in the ordinary course of business
- § 1:46 — —Grant of a security interest in new property
- § 1:47 — —New value
- § 1:48 — —Floating liens
- § 1:49 —Who can recover the transfer?
- § 1:50 Executory contracts and unexpired leases
- § 1:51 —Definition
- § 1:52 —Disposition
- § 1:53 — —Requirements for rejection
- § 1:54 — —Requirements for assumption
- § 1:55 —Nonassumable executory contracts
- § 1:56 —Time limits
- § 1:57 —Rules governing specific executory contracts
- § 1:58 — —Collective bargaining agreements
- § 1:59 — —Licenses
- § 1:60 — —Shopping center leases
- § 1:61 —Contract provisions
- § 1:62 — —Bankruptcy termination clause
- § 1:63 — —Anti-Assignment clause
- § 1:64 Filing a claim
- § 1:65 Reclamation rights
- § 1:66 Consignments
- § 1:67 Rights of secured creditors
- § 1:68 —Secured claim
- § 1:69 —Valuation of collateral
- § 1:70 Creditors’ committee’s right to initiate suit
- § 1:71 The plan of reorganization—Who can propose a plan?

## TABLE OF CONTENTS

§ 1:72	—Plan provisions
§ 1:73	— —Impairment
§ 1:74	—Disclosure process
§ 1:75	— —Modifications
§ 1:76	—Voting
§ 1:77	—Confirmation process
§ 1:78	— —Parties affected
§ 1:79	—Appeals
§ 1:80	Cramdown
§ 1:81	—Unfair discrimination
§ 1:82	—Liens and interests
§ 1:83	—Rate of interest
§ 1:84	— —Solvent-debtor exception
§ 1:85	Prepackaged bankruptcy plans
§ 1:86	Insider trading
§ 1:87	Releases
§ 1:88	—Exculpatory clause
§ 1:89	Expedited process for small businesses
§ 1:90	Successor products liability actions in bankruptcy
§ 1:91	Exceptions to discharge
§ 1:92	—Records
§ 1:93	Dismissal or conversion
§ 1:94	Reopening a bankruptcy case
§ 1:95	Discrimination

Appendix 1-A. Checklist for Representing a Company When a  
Supplier/Customer Files for Chapter 11  
Protection

Appendix 1-B. Some Tips on Monitoring a Bankruptcy Case

## **CHAPTER 2. TRUSTEE APPOINTMENT UNDER THE BANKRUPTCY LAWS**

§ 2:1	Introduction
§ 2:2	U.S. trustee program
§ 2:3	Eligibility and qualifications
§ 2:4	Appointment—U.S. trustee
§ 2:5	—Chapter 11 trustees
§ 2:6	—Chapter 7 trustees
§ 2:7	—Interim trustees
§ 2:8	Selection by creditors—Chapter 7
§ 2:9	—Chapter 11
§ 2:10	Obligations—Trustee's duties
§ 2:11	—Breach of duty—Removal
§ 2:12	— —Liability for negligence
§ 2:13	— —Qualified immunity
§ 2:14	Compensation

- § 2:15 Employment of professionals
- § 2:16 Fourth Amendment
- § 2:17 Conclusion

Appendix 2-A. Bibliography

### **CHAPTER 3. PREFERENTIAL TRANSFERS**

- § 3:1 Introduction
- § 3:2 Elements of a preferential transfer—Transfer of debtor’s interest in property
  - § 3:3 — —Transaction as a transfer
  - § 3:4 —Antecedent debt—§ 547(b)(2)
  - § 3:5 —Transfer of debtor’s interest in property—Debtor’s property
    - § 3:6 —Minimum dollar threshold
    - § 3:7 —Debtor’s insolvency—§ 547(b)(3)
    - § 3:8 —Improvement of creditor’s position—§ 547(b)(5)
  - § 3:9 Time of transfer—Perfection of security interests
    - § 3:10 —Payment by check
    - § 3:11 —Garnishment
  - § 3:12 Insider guaranties
  - § 3:13 Exceptions
    - § 3:14 —Contemporaneous exchange
    - § 3:15 —Payment in the ordinary course of business
    - § 3:16 —Grant of security interest in new property
    - § 3:17 —New value
    - § 3:18 —Floating liens
    - § 3:19 —Right of setoff
    - § 3:20 —The “earmarking” doctrine
    - § 3:21 —Statutory lien
    - § 3:22 —Forward contracts
  - § 3:23 Exempted transactions
  - § 3:24 Letters of credit as preferences
  - § 3:25 Parties in interest
  - § 3:26 Jurisdictional limitations
  - § 3:27 Preemption
  - § 3:28 Sale of preference claim

### **CHAPTER 4. EXECUTORY CONTRACTS AND BANKRUPTCY**

- § 4:1 Introduction
- § 4:2 Determining whether a contract is executory
- § 4:3 Disposition of executory contracts
  - § 4:4 —Assumption or rejection
  - § 4:5 — —Assumption
  - § 4:6 — — —Duty to cure

## TABLE OF CONTENTS

§ 4:7	— — —Entire contract
§ 4:8	— — —Adequate assurances of performance
§ 4:9	— — —Proposed sublease that conflicts with master lease does not provide adequate assurance of future performance
§ 4:10	— — —Deposit of three months' rent is sufficient to provide adequate assurance
§ 4:11	— — —Tenant has no right of setoff if debtor assumes lease and gives adequate assurance of future performance
§ 4:12	— — —Proposed assignment of trademark license that substantially changes performance called for under original agreement does not provide adequate assurance
§ 4:13	— — —Compliance with use clause not a prerequisite for finding adequate assurance of future performance
§ 4:14	— — —Adequate assurance not provided where assignee refuses to provide current financial statement
§ 4:15	— — —Assignment of lease to financially sound company that will cure past defaults and will continue the established course of dealing with the lessor provided adequate assurance
§ 4:16	— — —Court will not gamble on debtor's projection of profitability at expense of creditor that would otherwise be entitled to return of its property
§ 4:17	— — —Debtor's purported assumption of lease that was not approved by court is not enforceable
§ 4:18	— — —Debtor's failure to maintain franchise operations constituted incurable default
§ 4:19	— — —Adequate assurance of future performance— Debtor's rejection of distribution center lease prohibited assumption of supply contract
§ 4:20	— — Rejection
§ 4:21	— — —Effect
§ 4:22	— — —Claim for breach
§ 4:23	— — Timing
§ 4:24	— — Contract performance
§ 4:25	— — <i>Ipso facto</i> clause
§ 4:26	Assignment
§ 4:27	— — Conditions
§ 4:28	— — Entire contract
§ 4:29	— — Anti-Assignment provisions
§ 4:30	Types of contracts
§ 4:31	— — Equipment leases
§ 4:32	— — Licenses
§ 4:33	— — Franchises

- § 4:34 —Purchase of assets
- § 4:35 —Limited partnership agreement
- § 4:36 —Consumer contracts—Retail installment sale contract
- § 4:37 — —Retirement agreement
- § 4:38 — —Rent-to-Own contract
- § 4:39 — —Leases
- § 4:40 Conclusion

## **CHAPTER 5. APPLICATION OF THE AUTOMATIC STAY**

- § 5:1 Introduction
- § 5:2 —Scope of the stay
- § 5:3 —Administration of the stay
- § 5:4 Acts prohibited by the automatic stay—Section 362(a)(1): Commencement or continuation of any proceeding on prepetition debts—Inapplicable to proceeding on post-petition debts
- § 5:5 — —Proceedings covered
- § 5:6 —Section 362(a)(1): Commencement or continuation of any proceeding of prepetition debts—Proceedings covered—Appeals
- § 5:7 —Section 362(a)(2): Enforcement of a prepetition judgment
- § 5:8 —Section 362(a)(3): Attempts to obtain possession of property
- § 5:9 — —License agreements
- § 5:10 — —Property in possession of debtor’s estate
- § 5:11 — —Letters of credit
- § 5:12 — —Perfection of a security interest
- § 5:13 — —Executory contracts
- § 5:14 — —Right of setoff
- § 5:15 — —Tax status
- § 5:16 — —Competitive acts
- § 5:17 —Section 362(a)(4): Acts to create, perfect, or enforce a lien against property of the estate
- § 5:18 — —Timing
- § 5:19 — —Letter of credit
- § 5:20 —Section 362(a)(5): Acts to create, perfect, or enforce a lien against property of the debtor
- § 5:21 — —Construction lien against third-party property
- § 5:22 —Section 362(a)(6): Acts to collect, assess, or recover prepetition claims
- § 5:23 —Section 362(a)(7): Setoff
- § 5:24 — —Generally
- § 5:25 — —Bank’s administrative hold
- § 5:26 — —Withholding payment

## TABLE OF CONTENTS

§ 5:27	— —Recoupment
§ 5:28	Exceptions from the automatic stay
§ 5:29	—Section 362(b)(1): Criminal proceedings
§ 5:30	—Section 362(b)(3): Perfection of interest under relation-back statute
§ 5:31	—Section 362(b)(4): Government action
§ 5:32	— —Governmental capacity
§ 5:33	— —Types of governmental powers—Labor laws
§ 5:34	— — —Court-Imposed sanctions
§ 5:35	— — —Licensing
§ 5:36	— — —Environmental laws
§ 5:37	— — —Civil forfeiture
§ 5:38	— — —Consumer protection laws
§ 5:39	—Section 362(b)(18): Statutory lien for real property tax
§ 5:40	Criminal restitution
§ 5:41	Foreign insolvency proceedings
§ 5:42	Relief from the stay
§ 5:43	—Grounds for relief
§ 5:44	— —Lack of adequate protection
§ 5:45	— —Equitable considerations
§ 5:46	— —Multiple filings
§ 5:47	—Parties who may file for relief
§ 5:48	—Timing
§ 5:49	—Appeals
§ 5:50	—Effects of relief from stay
§ 5:51	Termination
§ 5:52	Sanctions for violating the automatic stay
§ 5:53	Conclusion

## **CHAPTER 6. RECLAMATION OF GOODS UNDER § 546(C)**

§ 6:1	Bankruptcy Code § 546(c)
§ 6:2	—Reclamation under Article 2 of the UCC
§ 6:3	— —Prior to delivery
§ 6:4	— —During delivery
§ 6:5	— — —Redirection of Goods
§ 6:6	— — —Notices
§ 6:7	— —After delivery
§ 6:8	—Exclusivity of the Bankruptcy Code
§ 6:9	—Scope
§ 6:10	— —Types of sellers
§ 6:11	— —Cash sales
§ 6:12	Preconditions to right of reclamation
§ 6:13	—Insolvency
§ 6:14	—Buyer's possession of identifiable goods

- § 6:15 — —Defining “possession”
- § 6:16 — —Defining “identifiable goods”
- § 6:17 Elements of reclamation demand under § 546(c)
- § 6:18 —Form of demand
- § 6:19 —Timing of demand
- § 6:20 — —Computing the reclamation demand time period
- § 6:21 — —Determining debtor’s receipt of goods
- § 6:22 — —Determining the time when service was completed
- § 6:23 Reclamation procedures
- § 6:24 Rights of competing interests in goods
- § 6:25 Entitlement to relief
- § 6:26 —Satisfaction of procedural requirements
- § 6:27 —Valuation
- § 6:28 — —Administrative expense status
- § 6:29 — —Amount of claim
- § 6:30 Section 503(b)(9)

## **CHAPTER 7. CREDITORS’ COMMITTEE’S RIGHT TO INITIATE SUIT**

- § 7:1 Introduction
- § 7:2 Source of authority—Implied power
- § 7:3 —Section 1103(c)(5)
- § 7:4 —Section 1109(b)
- § 7:5 Grant of authority—Prior court approval
- § 7:6 —*Nunc pro tunc* approval
- § 7:7 —Contents of application
- § 7:8 Determination of right to proceed—Debtor’s  
unjustifiable failure to sue
- § 7:9 —Standard of proof
- § 7:10 Composition of committee
- § 7:11 No right to initiate suit
- § 7:12 Right to intervene
- § 7:13 Standing of former management
- § 7:14 Standing of single creditor
- § 7:15 Conclusion

## **CHAPTER 8. PAYMENT OF ADMINISTRATIVE EXPENSES**

- § 8:1 Introduction
- § 8:2 —Acts benefiting the estate
- § 8:3 Allowed administrative expenses under § 503—  
Attorneys’ fees incurred by creditors’ committee  
members
- § 8:4 —Environmental expenses
- § 8:5 —Taxes
- § 8:6 —Involuntary petition expenses

## TABLE OF CONTENTS

- § 8:7 —Break-up fees
- § 8:8 —Value of goods
- § 8:9 — —Debtor's receipt of goods
- § 8:10 — —Effect of preference payments
- § 8:11 Charging the debtor's secured collateral under § 506(c)
- § 8:12 —Who has standing to bring a claim under § 506(c)?
- § 8:13 —Analyzing claims under § 506(c)
- § 8:14 Conclusion

## **CHAPTER 9. ACQUIRING CRITICAL VENDOR STATUS**

- § 9:1 Doctrine of necessity
  - § 9:2 Authorization for critical vendor payments
  - § 9:3 —Section 105: Power of court
  - § 9:4 —Section 1107: Rights, powers, and duties of debtor-in-possession
  - § 9:5 —Section 363: Use, sale, or lease of property
  - § 9:6 —Section 362: Automatic stay
  - § 9:7 Elements of a claim for critical vendor status
  - § 9:8 —Case law
  - § 9:9 —Court rules
  - § 9:10 Considerations
  - § 9:11 —Identify the creditors to be assigned critical vendor status
  - § 9:12 —Consider alternatives to paying prepetition debts
  - § 9:13 —Specify the terms of the obligation to be assumed by the critical vendor
  - § 9:14 Effect of critical vendor status
  - § 9:15 —Preferences
  - § 9:16 —Performance
  - § 9:17 —Setoff
  - § 9:18 Recovery of critical vendor payments
  - § 9:19 Conclusion
- Appendix 9-A. UAL Corporation—Letter Stating Terms under Which Critical Vendors Are to Receive Payment
- Appendix 9-B. Acknowledgment by Essential Trade Creditor

## **CHAPTER 10. ADEQUATE PROTECTION**

- § 10:1 Introduction
- § 10:2 Purpose of adequate protection
- § 10:3 Determining the need for adequate protection
- § 10:4 —Valuation
- § 10:5 —Equity cushion
- § 10:6 —Depreciation of value

- § 10:7 — —Burden of proof
- § 10:8 — —Opportunity costs
- § 10:9 Form of adequate protection—Additional or replacement lien
- § 10:10 —The indubitable equivalent
- § 10:11 —Administrative priority claim
- § 10:12 —Existence of equity cushion

## **CHAPTER 11. PROOFS OF CLAIM**

- § 11:1 Introduction
- § 11:2 Act of filing
- § 11:3 —Bar date
- § 11:4 —Method of delivery
- § 11:5 —Jurisdiction
- § 11:6 —Revival of debtor’s cause of action
- § 11:7 Authority
- § 11:8 —Class-action proof of claim
- § 11:9 Basis for claim
- § 11:10 Informal proofs of claim
- § 11:11 —Documents submitted as informal proofs of claim
- § 11:12 — —Pleadings—Objections to confirmation
- § 11:13 — — —Disclosure statements
- § 11:14 — — —Motion for relief from stay
- § 11:15 — — —Adversary proceeding
- § 11:16 — —Correspondence
- § 11:17 —Strategic use of informal proofs of claim
- § 11:18 — —Sovereign immunity
- § 11:19 — —Right to jury trial
- § 11:20 —Amendment of informal proof of claim
- § 11:21 Claims filed after the bar date
- § 11:22 —Excusable neglect
- § 11:23 —Contingent claims
- § 11:24 —Amended claims
- § 11:25 —No-asset cases
- § 11:26 Transferred claims
- § 11:27 Withdrawal
- § 11:28 Liability based on proof of claim
- § 11:29 Conclusion

## **CHAPTER 12. INVOLUNTARY BANKRUPTCY PETITIONS**

- § 12:1 Introduction
- § 12:2 Reasons for filing an involuntary petition
- § 12:3 Debtors subject to involuntary bankruptcy petitions
- § 12:4 —Trusts
- § 12:5 —Dissolved corporations

## TABLE OF CONTENTS

§ 12:6	—Partnerships
§ 12:7	—Not-for-profit corporation
§ 12:8	Requirements for involuntary petition
§ 12:9	—Creditors—Number
§ 12:10	— —Identity
§ 12:11	— —Withdrawal
§ 12:12	—Claims—Amount
§ 12:13	— —Types—Contingent
§ 12:14	— — —Disputed
§ 12:15	— — —Transferred
§ 12:16	— — —Joint
§ 12:17	— — —Chapter 11 plan claims
§ 12:18	— — —Waiver of secured claims
§ 12:19	—Waiver
§ 12:20	Joinder of creditors
§ 12:21	Involuntary proceedings—Pleadings
§ 12:22	—Jurisdiction of bankruptcy court
§ 12:23	—Gap period
§ 12:24	—Grounds for relief
§ 12:25	— —Generally not paying debts
§ 12:26	— — —Amount and number of debts
§ 12:27	— — —Source of payments
§ 12:28	— —Appointment of a custodian
§ 12:29	Dismissal and withdrawal
§ 12:30	—Bad faith
§ 12:31	—Sanctions
§ 12:32	— —Grounds
§ 12:33	— —Standards
§ 12:34	—Fees on fees
§ 12:35	—Reimbursement of creditors' attorneys' fees

## **CHAPTER 13. BANKRUPTCY FRAUD CRIMES**

§ 13:1	Introduction
§ 13:2	Elements of bankruptcy crime—Knowledge and intent
§ 13:3	—Bankruptcy case
§ 13:4	—Property of the debtor's estate
§ 13:5	Types of fraud—Concealment
§ 13:6	—False claims
§ 13:7	—False accounts and false declarations
§ 13:8	—Bribery
§ 13:9	—Records fraud
§ 13:10	—Bankruptcy fraud
§ 13:11	—Dischargeability
§ 13:12	Multiplicity

- § 13:13 Sentencing guidelines
- § 13:14 —Grouping
- § 13:15 —Amount of loss
- § 13:16 —Amendments
- § 13:17 —Character of offense
- § 13:18 Restitution
- § 13:19 Conclusion
- § 13:20 Text of the Bankruptcy Fraud Statute: Title 18

## **CHAPTER 14. LETTERS OF CREDIT AND BANKRUPTCY**

- § 14:1 Introduction—Issues raised
- § 14:2 —Letters of credit—Background
- § 14:3 Jurisdiction
- § 14:4 Insolvent account party
- § 14:5 —Preferential transfers—Antecedent debt
- § 14:6 — —Secured claims
- § 14:7 — —New value exception
- § 14:8 — —Earmarking doctrine
- § 14:9 —Automatic stay
- § 14:10 —Default terms
- § 14:11 —Excess funds
- § 14:12 —Post-discharge
- § 14:13 Insolvent issuer
- § 14:14 —Insured deposit
- § 14:15 —Provable claim
- § 14:16 Insolvency of beneficiary
- § 14:17 Codebtors and subrogation rights
- § 14:18 Conclusion

## **CHAPTER 15. AVOIDANCE OF FRAUDULENT TRANSFERS UNDER § 548 OF THE BANKRUPTCY CODE**

- § 15:1 Introduction
- § 15:2 Acts constituting transfers
- § 15:3 Timing of transfer
- § 15:4 Intent of debtor
- § 15:5 Debtor's interest in property
- § 15:6 Reasonably equivalent value
- § 15:7 —Trustee's burden
- § 15:8 —Forms of equivalent value
- § 15:9 — —Indirect payments
- § 15:10 — —Forced sales
- § 15:11 — —Antecedent debt
- § 15:12 — —Surrender of interest in property

## TABLE OF CONTENTS

- § 15:13 Insolvency of debtor
- § 15:14 Employment contracts with insiders
- § 15:15 Effect of state fraudulent transfer laws
- § 15:16 Sale of avoidance claim
- § 15:17 Defenses and other considerations—Holder in due course
- § 15:18 —Safe harbor
- § 15:19 —Sole actor exception
- § 15:20 —Mere conduit or control test
- § 15:21 —Preliminary injunction

## **CHAPTER 16. DISTRIBUTORSHIP AND FRANCHISE AGREEMENTS AS EXECUTORY CONTRACTS IN BANKRUPTCY**

- § 16:1 Introduction
- § 16:2 Determining whether a contract is executory
- § 16:3 Termination
- § 16:4 —Expiration of agreement
- § 16:5 —Action taken prior to petition
- § 16:6 —Action taken after the petition—Intervening events
- § 16:7 — —Cure provisions
- § 16:8 Treatment of executory contracts—Disposition of contract by debtor
- § 16:9 — —Assumption
- § 16:10 — — —Retain contract
- § 16:11 — — —Assign contract
- § 16:12 — — —Sell contract
- § 16:13 — —Rejection
- § 16:14 — — —Covenants not to compete
- § 16:15 — — —Damages
- § 16:16 — — —Timing
- § 16:17 —Procedural requirements—Time limits
- § 16:18 — —Court approval
- § 16:19 —Rights of nondebtor party
- § 16:20 Claims
- § 16:21 Conclusion

## **CHAPTER 17. REJECTION OF A COLLECTIVE BARGAINING AGREEMENT IN BANKRUPTCY**

- § 17:1 Introduction
- § 17:2 Scope of bankruptcy court's authority
- § 17:3 Rejection of agreements
- § 17:4 —The debtor's obligations
- § 17:5 —Determination by the court

- § 17:6 —Expired agreements
- § 17:7 Factors considered
- § 17:8 —Relevant information
- § 17:9 —Necessary modifications
- § 17:10 —Bargain in good faith
- § 17:11 —Rejection without good cause
- § 17:12 —Meet at reasonable times
- § 17:13 —Fair and equitable
- § 17:14 —Balance of equities
- § 17:15 Contents of proposal
- § 17:16 Post-petition modifications
- § 17:17 —Application of § 1113 to pre-and post-petition modifications
- § 17:18 —Status of bargaining agreement
- § 17:19 —Relationship between §§ 1113 and 363(b)
- § 17:20 —Ordinary course of business
- § 17:21 —Modification under terms of confirmation order
- § 17:22 —Arbitration
- § 17:23 Rejection claim
- § 17:24 —Administrative expense status
- § 17:25 —Effective date
- § 17:26 Sale of debtor's assets
- § 17:27 Conclusion

## **CHAPTER 18. INTELLECTUAL PROPERTY AND BANKRUPTCY LAW**

- § 18:1 Introduction
- § 18:2 Property of estate
- § 18:3 Perfecting security interests in intellectual property
- § 18:4 —Copyrights
- § 18:5 —Trademarks
- § 18:6 —Patents and trade secrets
- § 18:7 —Revised UCC Article 9
- § 18:8 Assumption or rejection of intellectual property licenses
- § 18:9 —Executory contracts
- § 18:10 —The *Lubrizol* case
- § 18:11 —The Intellectual Property Bankruptcy Protection Act—11 U.S.C.A. § 365(n)
- § 18:12 — —Rejection by debtor
- § 18:13 — —Election by licensee
- § 18:14 — —Royalties
- § 18:15 — —Post-petition interests
- § 18:16 —Source code escrow accounts
- § 18:17 Assignment of licensing agreements
- § 18:18 Other bankruptcy issues—Reclamation of goods

## TABLE OF CONTENTS

- § 18:19 —Competing interests
- § 18:20 —Sale of software post-petition was a debt and not an administrative expense claim
- § 18:21 —Surcharge expenses to preserve intellectual property allowed
- § 18:22 —Filing § 8 affidavit does not violate automatic stay
- § 18:23 —Prepetition assignment of trademark is ineffective if debtor continues to use mark
- § 18:24 —Sale of intellectual property does not require purchaser to provide future data to licensee
- § 18:25 —Trade secrets
- § 18:26 —Perpetual royalties following sale

## **CHAPTER 19. ENVIRONMENTAL ISSUES IN BANKRUPTCY**

- § 19:1 Introduction
- § 19:2 Withdrawal of the reference
- § 19:3 Application of the automatic stay
- § 19:4 —Regulatory power exception
- § 19:5 —Evaluating government action—Affirmative action
- § 19:6 — —Money judgments
- § 19:7 — —Advancement of public policy
- § 19:8 — —Perfection of superlien
- § 19:9 Abandonment of the property
- § 19:10 —Exception to abandonment power: Protection of public health and safety
- § 19:11 —Conflicting applications of the exception
- § 19:12 Discharge of environmental liabilities
- § 19:13 —Injunctive relief
- § 19:14 —Claims for prepetition contamination
- § 19:15 — —Known claims
- § 19:16 — —Unknown claims
- § 19:17 — —Contemplated by claimant
- § 19:18 — —Constructive knowledge
- § 19:19 —Claims for ongoing contamination
- § 19:20 —Excusable neglect
- § 19:21 —Claims under laws enacted after discharge
- § 19:22 —Fines and penalties
- § 19:23 Classification and priority of environmental claims
- § 19:24 —Administrative expense
- § 19:25 —Unsecured
- § 19:26 Setoff
- § 19:27 Preemption
- § 19:28 Claims for contribution
- § 19:29 Direct action provisions
- § 19:30 Conclusion

Appendix 19-A. EPA Participation in Bankruptcy Cases

**CHAPTER 20. BANKRUPTCY AND  
NONRESIDENTIAL REAL PROPERTY  
LEASES**

- § 20:1 Introduction
- § 20:2 Lease agreements
- § 20:3 Obligations of the parties
- § 20:4 Timing—Termination
- § 20:5 —Assumption—Base period
- § 20:6 — —Extensions
- § 20:7 Assumption
- § 20:8 —Adequate assurance
- § 20:9 —Cure
- § 20:10 Rejection
- § 20:11 —Attornment
- § 20:12 The effectiveness of assumption or rejection
- § 20:13 —Communicating acceptance or rejection
- § 20:14 —Effective date
- § 20:15 Lease claims
- § 20:16 —Amount of post-petition claim
- § 20:17 — —Accruing prepetition
- § 20:18 — —Accruing post-petition
- § 20:19 —Administrative claims
- § 20:20 —Limits
- § 20:21 —Application of security deposit
- § 20:22 —Recoupment
- § 20:23 —Waiver
- § 20:24 —Types of damages
- § 20:25 Post-petition leases
- § 20:26 —Section 365
- § 20:27 —Section 502(b)(6)
- § 20:28 Possessory rights—Debtor as lessor
- § 20:29 —Trustee qualified immunity
- § 20:30 —Subleases
- § 20:31 —Sale of property
- § 20:32 —State law
- § 20:33 Waiver and estoppel
- § 20:34 Conclusion

**CHAPTER 21. THE EFFECT OF  
BANKRUPTCY ON INSURANCE POLICIES**

- § 21:1 Insurance policies—As assets of the bankruptcy estate
- § 21:2 —As executory contracts

## TABLE OF CONTENTS

- § 21:3 Effect of bankruptcy filing—On policy terms
- § 21:4 —On the continuation of litigation or arbitration
- § 21:5 —On cancellation of an insurance policy
- § 21:6 — —Retiree insurance benefits
- § 21:7 —On the rights of third parties
- § 21:8 —On letters of credit
- § 21:9 —On governing law
- § 21:10 —On pursuing coverage claim under policy
- § 21:11 Policy premiums—Preferential transfers
- § 21:12 —Right of reclamation
- § 21:13 —Discharge of obligations
- § 21:14 —Priority status
- § 21:15 —Unauthorized transfers
- § 21:16 Recovery of bankruptcy claims under policy
- § 21:17 Post-petition coverage
- § 21:18 Agent’s right to commissions—Setoff
- § 21:19 —Recoupment

## **CHAPTER 22. SALE OF PROPERTY AND COLLUSIVE BIDDING IN BANKRUPTCY**

- § 22:1 Introduction
- § 22:2 Sale of estate property
- § 22:3 —Jurisdiction
- § 22:4 Time for filing action
- § 22:5 Elements of collusive bidding—Lack of good faith
- § 22:6 —Fraudulent misrepresentation of a bid
- § 22:7 —Concealment
- § 22:8 —Restraint on bidding
- § 22:9 Procedural issues—Sufficiency of evidence
- § 22:10 —Time for objections
- § 22:11 —Standing
- § 22:12 Conclusion

## **CHAPTER 23. BANKRUPTCY AND ARBITRATION CLAUSES**

- § 23:1 Introduction
- § 23:2 Enforceability—Commercial transactions
- § 23:3 — —Enforceable
- § 23:4 — —Unenforceable
- § 23:5 —Labor claims
- § 23:6 Executory contracts
- § 23:7 The automatic stay
- § 23:8 Waiver
- § 23:9 Collateral attack of arbitration decision

## **CHAPTER 24. LIMITATION OF BANKRUPTCY CLAIMS FOR TERMINATED EMPLOYMENT CONTRACTS**

- § 24:1 Introduction
- § 24:2 Section 502(b)(7) of the Bankruptcy Code
- § 24:3 Application—Nexus between bankruptcy and termination—Required
- § 24:4 — —Not required
- § 24:5 —Existence of employment contract
- § 24:6 — —Shareholders
- § 24:7 — —At-will employees
- § 24:8 — —Consultants
- § 24:9 —Relationship of the parties
- § 24:10 — —Judgment
- § 24:11 — —Resignation
- § 24:12 — —Guaranty
- § 24:13 — —Retirement
- § 24:14 — —Independent contractor
- § 24:15 —Damages resulting from termination
- § 24:16 — —Vested accounts
- § 24:17 — —Attorneys' fees
- § 24:18 — —Notice damages
- § 24:19 — —Tort claims
- § 24:20 —Calculation of cap
- § 24:21 — —Legally required payments made on behalf of employee
- § 24:22 — —Setoff
- § 24:23 — —Prepetition payments
- § 24:24 — —Payments by third parties
- § 24:25 Priority of claim
- § 24:26 Conclusion

### **Bibliography**

### **Table of Laws and Rules**

### **Table of Cases**

### **Index**