

Bankruptcy Considerations in the Construction Industry

Langfred W. White, Esq.
Board Certified in Construction Law

The Law Offices of Langfred W. White, PA
25400 US Highway 19 North
Suite 160
Clearwater, FL 33763
Phone: (727) 797-5599
Fax: (727) 797-5695
email: lan@lwwhiteattorney.com
Cell: (727) 422-5064

I. The Setting

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NAHB Forecast

II. Types of Bankruptcies

Chapter 7 - Liquidation
Chapter 9 - Adjustment of Debts of a Municipality
Chapter 11 - Reorganization (or sometimes liquidation)
Chapter 12 - Adjustment of Debts of a Family Farmer or Fisherman with Regular
Annual Income
Chapter 13 - Adjustment of Debts of an Individual with Regular Income
Chapter 15 - Ancillary and Other Cases; Cross Border Cases

III. Initiating a Bankruptcy

- A. Voluntary Cases
- B. Involuntary Cases
- C. Dismissal of a Bankruptcy

IV. The Scenarios

- A. Who is the Debtor
 - 1. Owner as Debtor
 - 2. General Contractor as Debtor

3. Sub-Contractor as Debtor
 4. Materialman / Supplier as Debtor
- B. The Players (a/k/a who is your client)
1. Owner
 2. General Contractor
 3. Subcontractor
 4. Sub-subcontractor
 5. Supplier
 6. Construction Lender

V. Principal Issues of Concern for Construction Related Reorganization Cases

- A. Property of the Estate - 11 U.S.C. § 541
1. Letters of Credit
 2. Bonds
 3. Trusts (statutory, express, and constructive)
- B. Automatic Stay and Adequate Protection - 11 U.S.C. § 362
1. What is Stayed
 - a. Filing or Continuing Suits
 - b. Enforcing any Judgments against Debtor
 - c. Terminating Contracts
 - D. Etc.
 2. What is not Stayed
 - a. Recoupment
 - b. Late Perfection of Construction Liens 362(b)(3) and 546(b)
 - c. Actions against Non-Debtors and Property which is not Property of the Estate
 - (i) Players not in Bankruptcy (e.g. sureties)
 - (ii) Letter of Credit
 - (iii) Bonds
 - d. Work stoppage for non-payment for post-petition work.
 3. Comfort Orders

4. Relief from Stay and Adequate Protection
- C. Post-Petition operation - 11. U.S.C. §§ 1107, 1108, 364
 1. The Debtor-in-Possession
 2. Post-petition credit in the ordinary course
 3. Post-petition financing not in the ordinary course/
- D. Claims
 1. Proofs of Claim
 - a. Required
 - b. Not Required
 - c. Consequences of Filing
 2. Objections to Claims
 3. Allowance of Claims
- E. Order of Distribution in Liquidation Cases - 11 U.S.C § 507
- F. Executory Contracts - 11 U.S.C. § 365
 1. Ipso Facto Clauses
 2. Assumption or Rejection generally - “cure and assure”
 3. Duty (?) To Perform Pending Assumption or Rejection
 - a. Debtor’s Duty
 - b. Creditor’s Duty
 4. Shortening the Time to Assume or Reject - 11. U.S.C. § 365(d)(2)
 5. Non-Assumable Contracts
 - a. Credit Lines
 - b. Working Capital Lines
 - c. Supplier Accounts
 - d. Construction Loans
 6. Planning Considerations

- a. Assumption stipulations
- b. Post-petition financing

G. Preferences - 11 U.S.C. § 547

1. First Question - Does the transfer fit within the definition of a Preference

- a. A preference is a transfer:
 - to or for the benefit of a creditor
 - for or on account of an antecedent debt
 - made while the debtor was insolvent (presumptions)
 - made within the preference period (90 days/1 year)
 - that enables the creditor to receive more than it would have received in a liquidation

b. Transfers to:

- Secured Creditors
- Under Secured Creditors

c. Construction Liens and Perfection

2. General Rule - the trustee may avoid a preferential transfer

3. Non-avoidable Preferences/Defenses

4. State law analog - “zone of insolvency” and payments to directors, etc.

5. Planning Options

- a. Protecting lien rights
- b. Ordinary Course of Business
- c. New Value

H. Fraudulent Transfers and Obligations [Bankruptcy and State Law provisions]

1. Definitions

- a. 11 U.S.C. § 548
- b. F.S. §§ 726.105, 726.106 and 11 U.S.C. § 544

2. Consequences of a Constructively Fraudulent Transfer

3. Consequences of an Intentionally Fraudulent Transfer
 - a. to the Transferee
 - b. to the Debtor
 4. Planning Considerations
- I. Post-Petition Transactions - 11 U.S.C. § 549
1. The Debtor in Possession - 11 U.S.C. §§ 1107 and 1108
 2. Consequences of Unauthorized Transactions
 3. Planning Considerations
- J. Cash Collateral
- K. Reclamation Rights for Seller of Goods
- 11 U.S.C. § 546(c)(1)
- Must be a written demand
 - Recipient (debtor) must have been insolvent
 - Demand must be on or before earlier of 45 days after receipt of goods or 20 days after commencement of the case.
- 11 U.S.C. § 503(b)(9) Administrative expenses claim for goods delivered within 20 days of petition
- L. Reorganization Issues
1. Plan, Disclosure Statement, and Confirmation
 2. Best Interests of Creditors
 3. Acceptance / Rejection
 4. Cramdown
 - a. Required Showing

b. Absolute Priority Rule

5. Planning Considerations

VI. Some Thoughts for the Creditor about the Process

- A. The first meeting of creditors (the “341 meeting”)
- B. Creditor’s Committee
- C. Proofs of Claim
- D. Accelerating the Assumption (or rejection) of Executory Contracts
- E. Creditors’ Plans
- F. Strategies for Confirmation (a/k/a nuclear hand grenades)
- G. Critical Vendors
- H. Arbitration (?)