

BANKRUPTCY LAW

LAW 256.6F

Spring 2014

Mondays from 10:00 AM to 12:45 PM

Room 115

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COURSE INFORMATION

I. Overview of the Class.

The class is a survey of the United States Bankruptcy Code, with a special emphasis on business (as opposed to consumer) bankruptcy.

We will start with a brief overview of the history of bankruptcy laws.

We will then turn to exploring the policies that are reflected in the Bankruptcy Code and how its provisions are designed to implement (admittedly imperfectly) those sometimes competing policies.

The bulk of the course will be dedicated to the workings of the Bankruptcy Code -- *e.g.*, the commencement of a bankruptcy case, the automatic stay, the concept of the bankruptcy estate, how the estate is augmented through avoiding powers, how the estate is administered, powerful tools that can be used to deal with operational issues that may have caused a business to fail, even more powerful tools that can radically restructure financial arrangements (including adjusting relations between debtors and creditors and, perhaps even more importantly, among creditors), concepts underlying the allowance of claims (including the ability to deal with mass torts and injuries that have not yet manifested themselves), tools that are used to provide liquidity during a case (tempered by the rights of secured creditors), the use of bankruptcy as a means to implement M&A transactions, and the issues involved in confirming a chapter 11 plan.

Throughout the class, we will pay particular attention to the impact of bankruptcy law on other areas of the law, including the rights of secured creditors, licensing of intellectual property, environmental law, the use of bankruptcy as a means of affecting litigation, the enforceability and practical utility of provisions commonly found in financing agreements and other contracts, and efforts to contract around the Bankruptcy Code (via securitizations and similar structures). These topics are important to an understanding of bankruptcy law and also have a profound impact on other areas of the law; those practicing in other fields will be disadvantaged without a basic understanding of these topics.

While we will focus on business bankruptcies, the course will also touch on issues that are unique to consumer bankruptcies.

II. Your Instructor

I am a partner in the Los Angeles office of O'Melveny & Myers LLP, where I have practiced since graduating from Stanford Law School¹ in 1976.

For approximately the last 30 years,² my practice has involved the restructuring of distressed companies, both via chapter 11 and out of court. Many lawyers in this field gravitate towards representing debtors, to the exclusion of creditors, or vice versa. But I have had the fortune of representing the full range of participants in restructurings; e.g., debtors, secured creditors, official creditors' committees, ad hoc committees of creditors, acquirers of troubled businesses. Hopefully, this has allowed me to develop a balanced perspective.

The chapter 11 cases in which I have been involved include AMF Bowling, Philadelphia Newspapers, LandSource, New Century Financial Corp., Solutia, Tower Records, Warehouse Records, Sun Healthcare and Texaco.

I also dabble in close-up magic and promise to spice up the class with a few demonstrations of prestidigitation.

III. Office Hours and Means of Contacting Me.

¹ Please don't hold that against me.

² For approximately 7 years, before specializing in bankruptcy law, I practiced both general corporate law (mainly M&A and securities regulation) and litigation.

I am based in Los Angeles and will be on campus only on Mondays. I plan on keeping “office hours” at Café Zeb each Monday from about 9 to 9:45 am and from about 1 to 2 pm.³ I welcome group or individual discussions at Café Zeb. In addition, I will have an office -- Room 308 -- where you should be able to find me on Mondays when I am not at Café Zeb or in class. There is no need to make an appointment to attend the sessions at Café Zeb. It probably would be wise to schedule an appointment if you want to meet with me in Room 308, in order to make sure that I do not have a conflict.

In addition, please feel free to contact me via email. You can use either blogan@omm.com or benlogan@law.berkeley.edu

IV. Required Reading.

A. Casebook: We will be using Warren⁴, Bussel and Skeel, Bankruptcy (9th ed. 2012). Reading assignments in this casebook are identified in the syllabus as “WBS”.

B. The Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and Portions of the Judicial Code Governing Bankruptcy Jurisdiction. You will need a current version of the Bankruptcy Code (11 U.S.C. § 101, et seq.), the Federal Rules of Bankruptcy Procedure and portions of the Judicial Code (Title 28) governing bankruptcy jurisdiction.

The syllabus identifies the sections of these statutes and rules that are particularly relevant to the particular lesson. Please bring a copy of the Bankruptcy Code with you to class since many of the provisions are interrelated and you will need to be able to refer to them during class.

Many publishers sell copies of the Bankruptcy Code, Rules and related jurisdictional statutes. Any version is acceptable as long as it is current. Please make sure that your version of the Bankruptcy Code post-dates 2005 since Congress passed some significant changes that year.

Available editions

- **The Mini-Code and Mini-Rules.** AWHFY publishes what it calls the Mini-Code and Mini-Rules. This version is quite compact and the layout is easy to read and reference. In addition, since most real bankruptcy lawyers use the Mini-Code and Mini-Rules, you will identify yourself as a member of the cognoscenti if you use it.

³ The one exception is January 6, 2014. My wife graduated from Auburn and I will be flying home immediately after the class that day to attend the BCS Championship Game. War Eagle.

⁴ William Warren as opposed to Elizabeth Warren.

- The bookstore has the Mini-Code and Mini-Rules in stock and is selling them at a 20% discount -- \$40 instead of \$50.
- AWHFY also publishes annotated versions of the Mini-Code and Mini-Rules; each version is specific to a group of Circuits. The annotated versions include citations to the leading cases decided by the Supreme Court and the Court of Appeals for the relevant Circuits, organized by Code section and Rule number. This is a very useful tool for practicing lawyers. I regularly use the Western Edition (covering the 5th, 9th and 10th Circuits) and the Eastern Edition (covering the 1st, 2nd, 3rd, and 4th Circuits). However, I doubt that the extra cost of an annotated version would be justified for students.
- **Warren⁵, Bankruptcy and Article 9, Statutory Supplement**. This is a good compendium of the relevant statutes and rules. Its primary advantage is that in addition to the Bankruptcy Code and Rules, it includes Article 9 of the Uniform Commercial Code (“UCC”), which is useful but not required for the class. Its main disadvantage is that it is bulky and the text is dense largely because it includes other materials that you will not need -- Article 1 of the UCC, the Uniform Fraudulent Transfer Act (which you will need but is short and will be posted on the website), the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act, the Fair Debt Collection Practices Act and the Federal Tax Lien Act.
 - The bookstore does not stock this supplement.

C. Additional Materials. I will post on the course website some additional required reading. These materials will include the Uniform Fraudulent Transfer Act, copies of some recent cases not included in the casebook, and some articles and some other materials. The required readings included in the materials posted on the class website are identified in the syllabus by the designation “AM.”

V. Optional Reading

If you are interested in going beyond the required reading, there is a wealth of available material.

A. Summaries of bankruptcy concepts and law. The following two books are excellent and relatively short summaries of bankruptcy law.

- Elizabeth Warren, Chapter 11: Reorganizing American Businesses.
- Douglas G. Baird, The Elements of Bankruptcy.

⁵ Elizabeth Warren as opposed to William Warren.

B. The Merrill Lynch Guide to Understanding Financial Statements. This is a short pamphlet that I will post on the class website. Proficiency in reading financial statements is not required for this class and we will not explore the difficult issues with which accountants need to grapple. But some basic comfort with understanding financial statements will be helpful. So if you are concerned about your grounding with respect to financial statements, this pamphlet should help.

C. An Overview of American Bankruptcy Law For Business Debtors. This is a primer that I prepared a few years ago for clients. I will post it on the class website. I last updated it in 2009.

VI. PowerPoint Presentations Used in Class.

I will use several PowerPoint presentations during class. Shortly before or after each class, I will post the PowerPoints used in that class.

VII. Class Requirements; Grades

A. Class Participation.

I strongly encourage class participation and expect you to come to class prepared. I will be calling on people.

B. Grades.

Grades will be based on:

- Final examination: 90%.
 - A take-home open-book final.
 - Essay questions.
 - Word limits (to be announced mid-semester).
 - The exam should take about 3 hours to complete, but you will have 8 hours after downloading to turn it in.
- Class Participation: 10%.
 - The quality, rather than the quantity, of your class participation will determine this portion of your grade.

Syllabus

This syllabus is subject to revision based on the pace of our discussions, new developments, and other factors that I cannot now predict. To the extent the schedule is adjusted, I will announce that in class and on the class website as far in advance as is possible. I expect that we generally will take two short breaks during each class, so the Syllabus is generally divided into three blocks for each date we will hold class.

<u>Date</u>	<u>Topic</u>	<u>Bankruptcy Code Section; Other Statutes</u>	<u>Assignment</u>
January 6, 2014	A. History B. Creditors' Rights Outside of Bankruptcy C. Consensual Business Restructurings Out of Court		WBS: 18-20, 591-601, 1-18; AM: Constitution Art I, § 8, clause 4
	D. Overview of the Bankruptcy Code E. Policy of the Bankruptcy Code		WBS: 20-28; Optional Reading: AM: (i) Jackson, <u>Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain</u> , 91 Yale L.J. 857 (1982); (ii) E. Warren, <u>Bankruptcy Policy</u> , 54 U. Chi. L. Rev. 775 (1987)
	E. Who May Be a Debtor F. Voluntary Petitions	Bankruptcy Code §§ 109, 301	AM: (i) <i>Pennzoil v. Texaco</i> ; (ii) <i>Toibb v. Radloff</i> . WBS: 476-498; 519-521
January 13, 2014	A. Involuntary Petitions B. Efforts to Contract Out of the Bankruptcy System C. The Bankruptcy Estate C. Exempt Assets (Applicable only to Individual Debtors)	Bankruptcy Code § 303 Bankruptcy Code §§ 541, 1115 Bankruptcy Code § 522	AM: (i) P. Gilhuly, "The Involuntary Bankruptcy Petition: The World's Worst Collection Device"; (ii) <i>General Growth Properties</i> ; (iii) Law 360 Article, "The Future of SPEs in Light of General Growth" WBS: 29-40, 41 - 46

	D. Who is in Charge of the Estate? (i) DIP (ii) Trustee (iii) CRO	Bankruptcy Code §§ 1104, 1106, 1107, 1108	AM: (i) <i>Everett v. Perez</i> ; (ii) Motion to Appoint CRO in <i>In re ResCAP</i> WBS: 602-606 Optional Reading: AM: Logan, "Fiduciary Duties of Directors, Officers and Bankruptcy Trustees of Distressed Companies; (ii)
	E. Discharge (i) Non-Dischargeable Debts For individual Debtors; (ii) Grounds for Denying an Individual Debtor a Discharge (iii) Discharge for a Business Debtor	Bankruptcy Code §§ 523, 727, 1141	WBS: 127-165, 553-556, 832-836 AM: Law 360, "Student Loans are Hot Topic at Judges Conference"
January 20, 2014 Holiday - MLK Day			
January 27, 2014	A. The Automatic Stay	Bankruptcy Code § 362	WBS: 177-203
	B. Automatic Stay -- Third Parties	Bankruptcy Code §§ 362; 105(a)	WBS: 203-216
	C. Relief From the Automatic Stay	Bankruptcy Code § 362(d)	WBS: 216-222; WBS: 611-622
February 3, 2014	A. Claims; Secured Claims & Proceeds	Bankruptcy Code §§ 502, 503, 506, 507, 552, 1129(a)(9)	WBS: 77-79; 102-125; 741-742
	B. Future Claims & Successor Liability	Bankruptcy Code § 101(5)	WBS: 80-93
	C. Equitable Rights D. Environmental Claims	Bankruptcy Code § 101(5)	WBS: 93-102
	E. Mass Tort Claims	Bankruptcy Code § 365	AM: Nat'l Bankruptcy Review Commission, "Treatment of Mass Future Claims in Bankruptcy"

February 10, 2014	A. Executory Contracts: Rejection	Bankruptcy Code § 365	WBS: 223-230
	B. Executory Contracts: Assumption	Bankruptcy Code § 365	WBS: 237-250
	C. Executory Contracts: Assignment	Bankruptcy Code § 365	WBS: 250-259
	D. Executory Contracts: Interim Period Before Assumption or Rejection	Bankruptcy Code § 365	WBS: 259-266
	E. IP Licenses	Bankruptcy Code §§ 365(n); 101(35A)	WBS: 230-236. AM: (i) Jones, Uhland & Landis, "What's Termination Got To Do With It? Rejection After Sunbeam;" (ii) Levinson, Morse, Uhland, Burrows & DeBre, "Was Professor Ward Really Serious? IP and Bankruptcy--When Worlds Collide."
February 17, 2014 Holiday - Presidents' Day			
February 24, 2014	A. Leases	Bankruptcy Code §§ 365, 502(b)(6), 503(b)	WBS: 266-297
	B. Preferences	Bankruptcy Code §§ 547, 550-551	WBS: 315-356
March 3, 2014	A. B. Fraudulent Transfers	Bankruptcy Code §§ 544(b), 548; Uniform Fraudulent Transfer Act	WBS: 363-384; AM: (i) Uniform Fraudulent Transfer Act; (ii) <i>In re W.R. Grace</i> ; (iii) <i>Paloian v. LaSalle Bank</i>

	C. Corporate Distributions		WBS: 384-396
	D. Leveraged Buyouts	Bankruptcy Code §§ 546(e), (g), 548	WBS: 396-418; AM: (i) Hypothetical LBO; (ii) <i>In re Mervyn's</i> ; (iii) <i>In re Quebecor</i> ; (iv) Financial Lawyers Conference, Unavoidable Consequences: Recent Developments in Avoidance Actions Affecting Equity Interests; (v) <i>In re Tribune</i> .
March 10, 2014	A. Set offs	Bankruptcy Code §§ 553, 506(a)(1)	WBS: 356-363
	B. Insider Preferences	Bankruptcy Code §§ 547(b)(4)(B); 101(31).	WBS: 418 -419
	C. Strong Arm Avoidance	Bankruptcy Code §§ 544(a), 550	WBS: 420-429
	D. Equitable Subordination	Bankruptcy Code § 510(c)	WBS: 431-454
March 17, 2014	A. Use of Cash Collateral	Bankruptcy Code §§ 361, 363, 364,	WBS: 623-626
	B. DIP Financing	Bankruptcy Code § 364	WBS: 633-652 AM: O'Melveny & Myers, "DIP and Exit Financing."
March 24, 2014 Spring Break			
March 31, 2014	A. Evolving Norms	Bankruptcy Code § 363	WBS: 827-832 WBS: 652-665; 687-690 AM: (i) <i>In re Boston Generating</i> ; (ii) <i>In re Gulf Coast Oil Corp.</i>
	B. 363 Sales		

	C. Sales Free and Clear	Bankruptcy Code § 363(f)	WBS: 665-686 AM: Jones & Culler, “BAP Opinion on Clear Channel Likely to Chill Credit Bids.”
	D. Trading Claims	Bankruptcy Code § 1126(e)	WBS: 703-713 AM: (i) Wachtel Lipton, “Trading in Distressed Debt;” (ii) Law 360, “Deconstructing WaMu;” (iii) Bloomberg, “Hedge Funds Seek to Trade in Comfort;” (iv) <i>ResCAP</i> Mediation Order.
April 7, 2014	A. Exclusivity, Solicitation and Voting	Bankruptcy Code §§ 1121, 1125, 1126	WBS: 690-703; AM: Skim the AMF Bowling Disclosure Statement (The purpose of including this disclosure statement is to let you see an actual plan and disclosure statement, as opposed to burdening you with the substance. I suggest just skimming it.)
	B. Classification & Impairment	Bankruptcy Code §§ 1122, 1124	WBS: 713-734
	C. Other Confirmation Requirements	Bankruptcy Code §§ 1123, 1129(a)(1)-(6) 1129(a)(9)-(10)	WBS: 741-742; AM: Fried Frank, “Delaware Court Applies Section 1129(a)(10) on a per Debtor Basis.”
April 14, 2014	A. Feasibility & Best Interests	Bankruptcy Code § 1129(a)(7), (11)	WBS: 735-741; 787-788
	B. Cramdown: Secured Claims	Bankruptcy Code § 1129(b)(2)(A)	WBS: 742-783; AM: (i) Logan, Bender & Taylor, “The Seventh Circuit Takes the (River) Road Less Traveled;” (ii) <i>RadLAX Gateway Hotel v.</i>

			<i>Amalgamated Bank; (iii) Logan & Taylor, "Supreme Court Rules Secured Lender Has a Right to Credit Bid."</i>
	C. The Section 1111(b) Election	Bankruptcy Code §§ 1111(b), 1129(b)(2)(A)	WBS: 783-787
April 21, 2014	A. Absolute Priority Rule	Bankruptcy Code § 1129(b)(2)(B), (C)	WBS: 788-805
	B. New Value Plans	Bankruptcy Code § 1129(b)(2)(B), (C)	WBS: 805-827
	C. Substantive Consolidation		WBS: 454-471
	D. Effect of Confirmation	Bankruptcy Code § 1141	WBS: 832-835
April 25, 2014, 10:00 am - 1:00 pm	REVIEW SESSION		
April 29, 2014	FINAL EXAMINATION		

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