

Top Five U.S. Bankruptcy Issues For Foreign Investors

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Top Five Bankruptcy Issues

- **Preferences** – recovery of debt payments
- **Lien Avoidance** – nullify unperfected / improperly perfected liens
- **Constructive Fraudulent Transfers** – recovery of assets/value received
- **Rejection of IP Licenses by Licensor**
- **Assignment of IP Licenses by Licensee**

Preferences

- **Seven Elements:**

- A **transfer**: includes liens (when perfected)
- Of the **Debtor's property**: not “earmarked” funds
- To or for **benefit of creditor**
- On account of **antecedent debt**
- While Debtor is **insolvent**: presumption of insolvency 90 days before bankruptcy
- Made within **90 days before bankruptcy** (1 year for insiders)
- Enabled **creditor to receive more** than if transfer not made and debtor liquidated

- **Defenses:**

- Fully secured
- Contemporaneous exchange
- Ordinary course of business

Lien Avoidance

- **Trustee as Judicial Lien Creditor** – personal property
- **Trustee as Bona Fide Purchaser for Value** – real property
- **Proper Perfection for IP**
 - Patents
 - Trademarks
 - Copyrights

Constructive Fraudulent Transfers

- **Bankruptcy – the Power of the Collective Action**
- **Two Essential Elements:**
 - **Debtor in Financial Distress**
 - Insolvent
 - Undercapitalized
 - Intended to Incur Debts Beyond Ability to Pay
 - **Debtor Received Inadequate Consideration for Transfer**
 - Lack of “Reasonably Equivalent Value” or “Fair Consideration”
- **Defenses**
 - Initial transferee who takes in “good faith” and for value, gets credit for value given
 - Subsequent transferee who takes in “good faith” and for value, has full defense

Fraudulent Transfer Issues

- **Where did value given go?**
 - LBOs -- “collapsing” separate steps
- **Where did value received come from?**
 - Intercorporate guarantees -- *TOUSA* decision
- **“Safe Harbor” Defense (Section 546(e))**
 - Protects “settlement payments” or “margin payments” made by, to, or for the benefit of “financial institutions”
 - Although originally intended to protect securities clearing transactions, judicial decisions have expanded to include:
 - Redemption of debt
 - Payment to shareholders in LBO
 - May not apply to state law FT actions that revert to creditors after trustee fails to bring within limitations period

IP Licensing Issues

- **Executory Contracts that Trustee can:**
 - **Assume** – honor and perform
 - **Assume and Assign** – transfer to third party to honor and perform
 - **Reject** – breach as of petition date and cease to perform
- **Licensees Protected from Rejection**
 - Section 365(n) permits licensee to elect to retain rights
 - In “intellectual property” – U.S. patents and copyrights (not trademarks?)
 - For duration of license and extensions of right/under law
 - Must pay royalties; waives setoff rights and administrative claims
- **Licensors Protected from Assignment**
 - Section 365(c) prohibits licensee from assigning
 - Nonexclusive and exclusive patent licenses
 - Nonexclusive (but possibly not exclusive) copyright licenses
 - Trademarks
 - When licensor does not consent



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