

Alternatives to Bankruptcy

by Attorney John Humphrey, Taft Stettinius & Hollister LLP

A troubled company may use Chapter 11 bankruptcy to restructure its debts or to sell its assets. The assets of a troubled company can often be sold or otherwise liquidated relatively quickly and efficiently in a bankruptcy proceeding and leave far fewer loose ends afterward than most any other sale method.

However, Chapter 11 can be an expensive process. Further, sometimes bankruptcy is not fast enough, or the debtor may be in circumstances where another procedure will achieve a substantially similar end result in less time or at a lower cost. Creditors may prefer that the debtor not file bankruptcy and desire instead to assert their non-bankruptcy collection rights.

In these cases, the debtor and/or creditors will look to other alternatives to liquidate the debtor's assets or restructure. The primary alternatives to bankruptcy for a troubled business are:

1. Uniform Commercial Code foreclosure;
2. Assignment for the benefit

of creditors;
3. Receiverships; and
4. Creditor's composition agreements.

The following provides additional detail on the alternatives.

UCC Foreclosure Sale

There is a Uniform Commercial Code (hereinafter called the "UCC") that has been adopted as law, with typically only minor variations, in virtually all U.S. jurisdictions. This law is meant to promote uniformity between the states in the enforcement of commercial transactions.

The UCC has provisions that allow a debtor to grant security interests in personal property to a lender by agreement which serves as liens on the property. Upon the debtor's failure to pay a debt in the manner or time agreed, the lender may take possession of the collateral and with appropriate notice to the debtor, other secured creditors, and

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Tech Tip: National Consumer Law Center (NCLC) is available from the comfort of your home or office as a subscriber.

By Julie Koehne, Systems Librarian

There are now 21 consumer law treatises, many of which are well over 1000 pages, not counting thousands of sample pleadings, practice aids and primary sources that are available online. Email our reference team (reference@cms.hamilton-co.org) for a temporary user ID and password.



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Credit & Banking

- Fair Credit Reporting
- Truth in Lending
- Consumer Credit Regulation
- Credit Discrimination
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- Surviving Debt

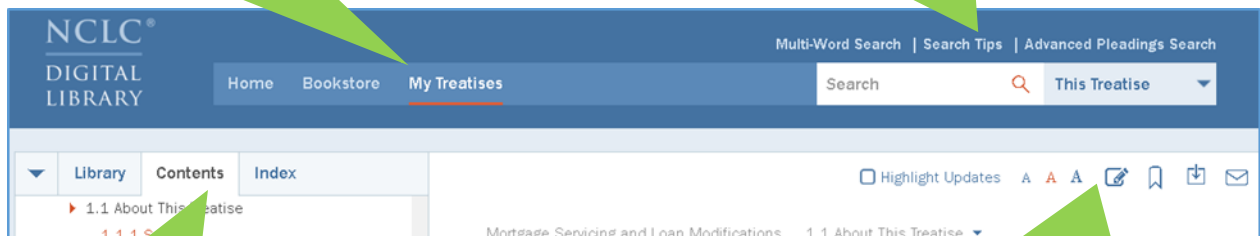
National Housing Law Project

- HUD Housing Programs: Tenants' Rights

Navigation

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Use one of the various types of searches to look for information.



Ability to browse the table of contents or use the index.

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Resource Highlight: Fastcase

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Fastcase has always been one of our most utilized and important resources, but in these crazy times, having instant access to this robust collection of legal materials at any time, from any location, is of even greater value. We're pleased to continue to offer this to you as a benefit of your subscription to the Law Library. If your subscription does not offer Fastcase because you are an individual attorney subscriber, please don't hesitate to contact [Vanessa](#) about how to upgrade.

As Julie mentioned in last month's [Tech Tip](#), and Vanessa highlighted on our [blog](#), Fastcase's newly updated interface will become the default next month. Starting in September, when you log in to Fastcase, you'll have immediate access to the sleek, new Fastcase 7 layout. The content will remain the same, but the way you access it will be a bit different. Because this is a fairly notable change, we're offered multiple ways for you to prepare.

Vanessa's [blog post](#) provides links to [video tutorials](#) created by Fastcase to help you with the transition. Julie's [Tech Tip](#) includes some clear step-by-step instructions for easy searching. And, we've partnered with Fastcase to offer a [live interactive webinar](#) for our subscribers on the new interface on August 28 at 12pm. This session will offer an hour of credit in Ohio and Kentucky, pending approval.

For questions and navigation tips, please feel free to contact our reference staff at reference@cms.hamilton-co.org.



New Website

We've been hard at work developing, testing and tweaking a new, streamlined website that we plan to roll out in the coming weeks. The web address will remain the same, but the site will have an updated look and more efficient functionality. Please stay tuned for more info, as we'll be providing details before its debut. We think you'll be pleased with your new user experience!

guarantors, sell it, and use the proceeds to reduce the amount that the debtor owes. This can be done with the assistance of a court, or completely without court intervention as long as possession of the property may be obtained without creating a "breach of the peace."

If the debtor agrees or at least does not object upon being given the opportunity, the creditor who has been granted the lien may keep the collateral in full or partial satisfaction of the debt and not even be required to sell the property subject to the lien.

If the creditor with the security interest does elect to sell the property, the sale must be conducted in a "commercially reasonable" manner. If the sale is not commercially reasonable, the creditor may be liable to the debtor, may not be able to collect any amount remaining after the application of the sale proceeds to the debt, or may not be able to pursue guarantors.

Advantages

The advantages of a UCC sale, compared to other proceedings including bankruptcy, are:

- It generally costs much less than a bankruptcy proceeding.
- It can be conducted quite quickly as the notice required to be given can often be as little as 10 days.
- It can be accomplished by force. In most cases, the sale can occur without the debtor's consent, though the sale may require court intervention if possession of the collateral can't be obtained by the creditor.

Disadvantages

The disadvantages of a UCC sale are:

- The only property that can be sold is personal property that can be the subject of a security interest under the UCC. Real estate interests and non-UCC personal prop-

erty cannot be sold using a UCC foreclosure sale. Transfer of real estate interests must typically be done in a separate proceeding which usually requires the filing of a lawsuit with a court.

- It can't be utilized by a creditor who does not have a security interest in the property. Unsecured creditors cannot force a UCC sale.
- The process can generally be derailed at any time prior to the final sale by the debtor filing bankruptcy.
- As there is almost always no court order approving the sale and the value obtained, it may require substantial litigation to collect the remaining amount owed from the debtor and guarantors.

Assignment for the Benefit of Creditors

An assignment for the benefit of creditors, commonly known as an "ABC," is a type of proceeding which occurs by the debtor transferring its assets to an assignee who serves as a sort of trustee to sell the debtor's assets for the benefit of creditors. The debtor that assigns its assets does not get a discharge. This means that the creditors of the debtor may continue to pursue the debtor for any unpaid amount. However, because the assignee will have sold the debtor's assets and distributed the money to all creditors by the time a creditor gets a judgment, a suing creditor may receive a judgment that is worthless because there are no longer any assets available to pay it.

Some states have laws about ABC proceedings that set forth in detail the procedures to be followed by the assignee and the powers and responsibilities of the assignee and creditors. Other states have no specific statutory law concerning ABC proceedings and rely on common law principles (i.e. previous decisions by courts serving as precedent). ABC proceedings are used with varying frequencies in different states. For example, Indiana has an ABC statute that is fairly detailed but ABC proceedings are quite rare. Illinois' ABC process is based on common law, and ABC proceedings there are relatively common.

Secured claims must be respected in ABC proceedings. If the debtor's assets are all subject to liens that exceed the assets' value, then there will be nothing left for unsecured creditors as a result of the ABC process. The secured creditor will get all of the proceeds of the debtor's assets in which it has liens, even in an ABC proceeding.

Advantages

The advantages of an ABC proceeding are:

- It is less expensive and time-consuming than bankruptcy in many instances.
- It can lead to a relatively beneficial outcome for creditors, as the creditors in each class can be expected to be treated similarly as other creditors in the class.
- It can limit the "race to the courthouse," where creditors try to be the first to sue and be paid while leaving the remaining creditors with nothing.

Disadvantages

The disadvantages of an ABC proceeding are:

- It requires the consent of the debtor. A creditor cannot force the debtor to assign its assets to the assignee.
- It is a liquidation proceeding only. There is typically no possibility for the debtor to reorganize.
- It generally requires the consent of secured creditors to work effectively, as any buyer taking the assets without the consent of the secured creditors will take the assets subject to the secured creditor's liens.

Receivership

A receivership involves the appointment of a third party to take over the troubled business and oversee its assets. This may be for the purpose of restructuring or reorganizing the business but is more typically used as a method to liquidate the business. The receiver may also bring claims that the debtor has against third parties in the name of the debtor.

parties in the name of the debtor.

A receiver is usually appointed by a state or federal court or federal agency and the court or agency will typically oversee the activities of the receiver

Receiverships are typically initiated after the debtor fails to pay its debts as they come due or fails to meet other legal obligations. The ease of obtaining a receiver over a debtor or its property varies substantially by state. The receiver's duties will typically be limited to those provided by the order of the court or agency appointing the receiver.

Advantages

The advantages of a receivership include:

- A receiver can typically sell real estate in addition to personal property and is superior in that respect to a UCC foreclosure sale.
- A federal court presiding over a receivership may be able to stay litigation against the debtor in multiple jurisdictions so all creditors are required to participate in the receivership instead of pursuing the debtor's assets piecemeal.
- The receivership can be imposed by the court upon the debtor without the debtor's agreement.
- A receivership action can be filed by an unsecured creditor as well as a secured creditor. Generally, the court reviewing the request for a receiver to be appointed will consider candidates proposed by the creditor requesting the receiver.
- A receiver can pursue claims against officers and directors of the debtor on behalf of the debtor and disburse the proceeds of that litigation to the creditors.

Disadvantages

The disadvantages of a receivership include:

- A receivership can be fairly expensive and time consuming as a process, as the receiver must be compensated and may

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also require counsel who is compensated from the debtor's assets.

- If the receivership is ordered by a state court, the receivership court may not have jurisdiction over property in another state and a suit may be required in the non-receivership state to control such property.

Composition Agreement

A composition agreement is a contract between a debtor and some or all of the debtor's creditors that allows the debtor to reorganize and stay in business or conduct an effective liquidation.

A composition agreement works best when the debtor has relatively few creditors who have an interest in the debtor's future success. Composition agreements will almost always include an agreement by the creditors to accept less than full payment and/or extend the time for payment as well as an agreement to "standstill" and not pursue enforcement of the creditors' debts for a period of time. There are a myriad of other provisions that can be used to provide special features in favor of the debtor and creditors in a composition agreement.

Advantages

The advantages of a composition agreement are as follows:

- It can lead to a reorganization of the debtor's business or can be used to effectuate a sale.
- It can be very quickly accomplished and cost effective, particularly if the debtor has a small number of larger creditors.
- As the composition is a contract, it can be extremely flexible and contain terms that are closely tailored to the debtor's particular situation.
- It can occur quietly, as a private matter, and may help to avoid the negative publicity that a bankruptcy filing could create.

Disadvantages

The disadvantage of a composition agreement is as follows:

It requires that enough important creditors consent to make the process beneficial. If there are too many creditors who refuse to agree, the process will not work.

Conclusion

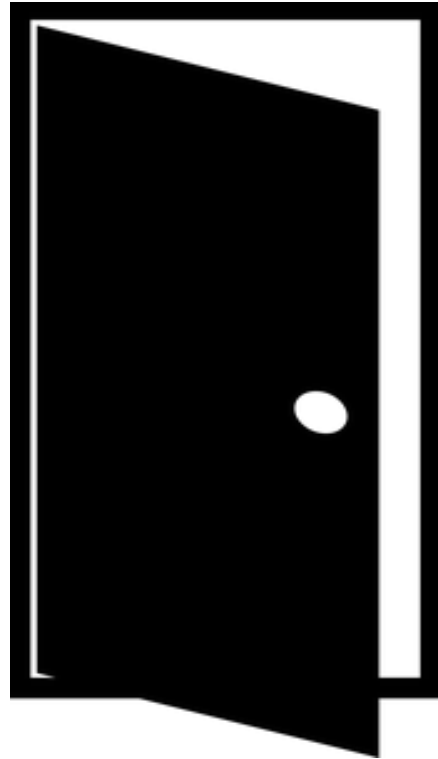
While Chapter 11 bankruptcy is a powerful tool, it can be quite expensive, risky, complicated, and time consuming. Prior to filing, debtors should always consider whether a more effective or efficient alternative is available to accomplish the same goals.

Many of these alternatives are also available to creditors if the debtor simply refuses to face its problems.

Of course, each of these alternatives has many more aspects than can be described in this summary. A debtor or creditor should always seek experienced counsel who can explain each alternative and help determine which works best in the particular circumstances.

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John Humphrey is a partner in the Taft Indianapolis office who represents secured lenders, trade creditors, landlords, buyers and sellers of distressed businesses and others seeking financial solutions in complex legal matters.

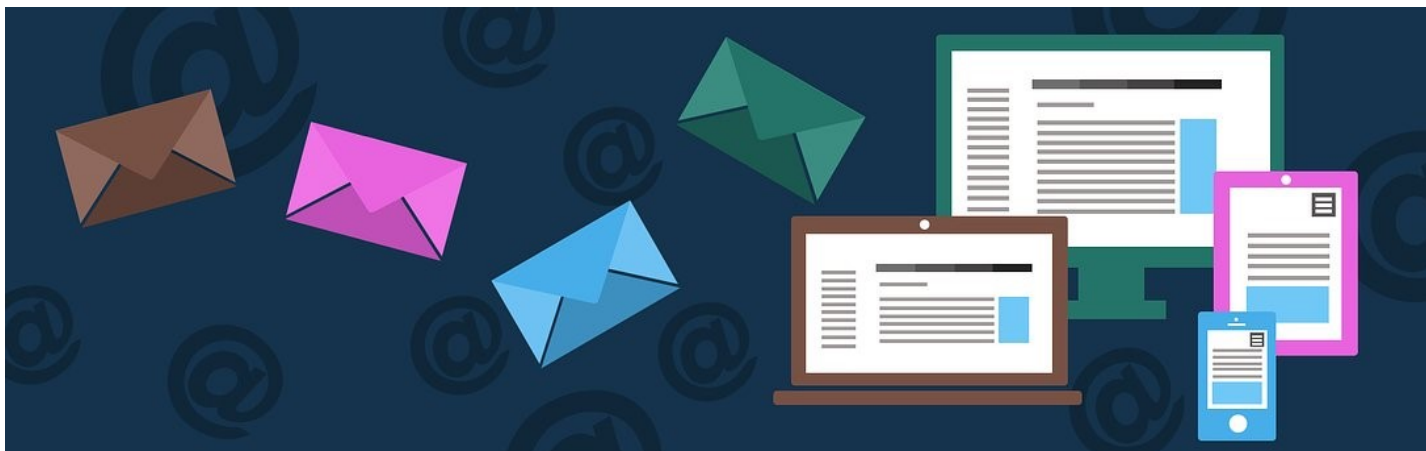


Reopening Update

Since we reopened our physical facility on July 6, we've been pleased to see many familiar (masked) faces visiting us to take advantage of all of the great amenities we offer on site.

Our computer lab is up and running with social distancing protocols in place. Our conference rooms and boardroom are available to reserve, with occupancy limitations and safe distancing measures, and we're rigorously cleaning after every patron uses our space. Our print materials still circulate and we're here to conduct research for you. We strive to provide a safe, peaceful space for you to conduct your research, meet your clients, hold your remote meetings, utilize our video conferencing services and wash your hands.

We currently provide all of these on-site services on Mondays, Tuesdays and Thursdays. We so appreciate our patrons coming in and utilizing these services and respecting our health and safety protocols. This allows us to continue to serve you on site. And please don't forget to [email](#) us your reference questions on Wednesdays and Fridays! We're still available to serve you, even when the physical facility isn't open.



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If you have any questions about this please feel free to contact our Reference Librarian, [Amy Kurlansky](#).

Upcoming CLEs—Live Interactive Webinars

Friday, August 28, 2020, 12-1 PM
Fastcase 7
Presenter: Erin Page
1.0 general credit in OH & pending in KY

Wednesday, September 2, 2020,
1:30-2:30 PM
Mediation
Presenter: Attorney Anthony Castelli
1.0 general credit in OH & pending in KY



Bankruptcy Law Resources

Law Library subscribers have access to a variety of Bankruptcy Law Resources, including those listed below. If you have questions about these resources, contact the reference staff at reference@cms.hamilton-co.org or 513.946.5300.

The American bankruptcy law journal
K1 .M38

The attorney's handbook on small business reorganization under Chapter 11
KF1544 .W55 2015

The Bankrupt law of the United States
KF1524 .A8

Bankruptcy code: including text and legislative history
KF1524 .C632

Bankruptcy code, rules & official forms
KF1520 .B61

Bankruptcy court decisions
KF1519 .B34

Bankruptcy courts & procedures
KF1527 .E9

Bankruptcy deskbook
KF1524 .L435

Bankruptcy evidence manual
KF1530.E87 B36

Bankruptcy fundamentals
KFO221 .B34 2014

Bankruptcy law
KFO221 .B345 2017

Bankruptcy litigation

KF1527 S64 2008—

Collier on Bankruptcy
KF1524 .C6

Online Resources

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Ch. 13 Bankruptcy
How to File fro Ch.7 Bankrutcpy
New Bankruptcy
Represent Yourself in Court

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Pratt's Journal of Bankruptcy Law

Overdrive

Epstein & Nickles' Principles of Bankruptcy Law
Ohio Annotated Bankruptcy Law Handbook
Ohio Bankruptcy Handbook

Westlaw (available onsite for subscribers)

American Bankruptcy Institute
American Bankruptcy Institute Journal
American Bankruptcy Institute Law Review
Bankruptcy Court Decisions Weekly News and Comments
Bankruptcy Developments Journal
Bankruptcy Law Manual
Bankruptcy Litigation
Bankruptcy Service, Lawyers Edition
Chapter 11 Reorganizations, Second Ed.

Upcoming Events:

August 28, 2020: Live Interactive Webinar CLE: Fastcase 7; 1 general credit in OH & pending in KY

September 2, 2020: Live Interactive Webinar CLE: Mediation; 1 general credit in OH & pending in KY

September 5, 2020: Labor Day, Library Closed



August 2020 Law Library Newsletter

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