

# **ADVANCED JUDGMENT ENFORCEMENT IN PENNSYLVANIA**

- § 1. Semi-Amicable Collection Methods  
and**
- § 2. The Potential Lender Liability Lawsuit**

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# OPTIONS, OPTIONS, OPTIONS

- A. Enforce the judgment, issue *writs of execution* and conduct sheriff's sales.
- B. Collect against the guarantors, confess judgment against the guarantors, issue *writs of execution* and conduct sheriff's sales.
- C. Discount the loan and sell it in the secondary market.
- D. Engage in an amicable workout.

# THE SEMI-AMICABLE WORKOUT

- Unhappy bank
- Unhappy debtor
- Very unhappy guarantors
- Loan in default
- Judgment confessed
- Likely that bankruptcy has been threatened
- Goal: Reduce the tensions
- Remind the debtor and the guarantors of all the reasons to work with the bank
- Keep the debtor and the bank working together to maximize the recovery to the bank and reduce the deficiency

# KNOW YOUR CLIENT

- What are your client's goals?
- Don't just assume, ask and ask again.
- Does the client trust the debtor?
- Does the bank have an agenda (need) of which you need to be aware?

# Evaluate the Bank's Credit File

- loan documentation
- security agreements
- UCC filings
- credit reports
- analysis of the borrower and guarantors
- correspondence
- financial statements of the borrower
- accounts receivable aging reports
- tax returns
- appraisals of plant, machinery & equipment
- title insurance binders
- environmental reports
- net worth statements of the guarantors
- inter-creditor and/or participation agreements
- credit write downs

# Evaluate the Business with the Bank

- Business scope
- Business problems
- Assets
- Products
- Future products?
- Sale of business
- Capitalization
- Management
- Guarantors
- Professionals
- Owners
- Trust and communication
- Status of collateral
- Taxes
- Litigation
- Financials
- Cash flow
- Preferential payments
- Web Searches

# Goal: Get The Bank Paid

- i. More collateral? **Yes.**
- ii. An immediate cash pay down? **Yes.**
- iii. More guarantors? **Yes.**
- iv. Guarantors to liquidate assets and pay balance to bank? **Yes.**
- v. If not liquidated, then pledges of marketable securities? **Yes.**
- vi. Sale of non-critical company assets? **Yes.**
- vii. Sale of excess inventory? **Yes.**
- viii. Sale of product lines unrelated to core business? **Yes.**
- ix. Limit cash to be taken out of business by owners **Yes.**
- x. Limitations on debts the company can pay? **Yes.**
- xi. Tightened restrictions on use of credit lines? **Yes.**
- xii. Estoppel Certificates, acknowledgment of no claims against the bank? **Yes.**
- xiii. Reconveyance of any assets taken out of Co. by the owners? **Yes.**
- xiv. Monthly periodic reports by management of the business? **Yes.**
- xv. Restrictions on what guarantors can do with their money and assets? **Yes.**
- xvi. Liens on the guarantors' assets not already liened? **Yes.**

# Debtor's Goal: Buy Time

Cash flow will improve	Big events to come	New sales	New investors
New products	Revenue will go up	Costs will go down	We will make money and pay you off!

# Avoiding Problems

- **The Negotiation Letter**
- Reference to the loans, loan documents and parties.
- Acknowledgement debtor requested the bank to forebear from collection proceedings.
- Acknowledgement that the loan documents remain in force.
- Bank has not waived and is not waiving any of its rights under the loan documents.
- Any party can terminate discussions at any time.
- No agreement until reduced to an agreed writing and signed by all parties.
- No guarantee the negotiations will result in a deal.
- Debtor should not forego its pursuit of other options, including finding a new lender, raising additional equity, selling assets, etc.
- That the debtor is entering into these negotiations with legal counsel of its choosing.
- That the loan documents may only be amended or modified by a written agreement.

# Estoppel Certificates

- Reference the loans, loan documents and parties.
- Acknowledgement that loan documents are properly executed and binding according to their terms.
- Acknowledgement that loan documents are enforceable against the debtor.
- Bank has not waived any of its rights.
- Loan documents may only be amended or modified by a written agreement.
- That the bank is not in default of any of the loan documents.
- That the debtor has no defense to repayment of the loan in whole or in part.
- That the debtor has no claim against the bank arising out of or in connection with the loan, the loan documents and all actions taken by the bank to date.

# Guarantors/Sureties

- The first step is to read the document. Guaranty or Surety?
- Second, review the agreement to see if you need the consent of the guarantor to change any of the loan terms.
- Third, check to see if the bank is holding any collateral belonging to any guarantor.
- Fourth, get updated financials
- Fifth, open up a dialogue with the guarantors. They may have alternate solutions that could be of benefit to the bank.

# Is Bankruptcy Preferable?

- Oversight of the Bankruptcy Court.
- Filing of monthly financial reports under oath.
- The ability to have a say in the debtor's reorganization.
- The ability to have a trustee appointed if there are sufficient grounds.
- The right to be on a committee of unsecured creditors in a chapter 11.
- Bankruptcy fraud criminal sanctions.
- The right to recover preferential transfers, made within 90 days as to third party creditors and going back up to one year as to insiders.

# Forensic Accountants, Fraudulent Conveyances,

- The Money Trail
- The purpose of forensic accountants is to find out where the debtor has transferred its assets, its cash or other property.
- If found, these transfers can be reversed under the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa.C.S. §§ 5105-5110 (the "UFTA")

# Hidden Assets: Intellectual Property

## Patents

35 USC §1 et seq; anything man-made that is new and useful.

Patents may be the only asset of a business or the business may have a product, process or design that's patentable

Business methods are the hot patent topic.

State Street Bank v. Signature Financial, 149 f.3d 1368 (Fed. Cir. 1998). Patents have invaded every industry, not just high tech, and must be considered in evaluating the assets of any company.

# Hidden Assets: Intellectual Property

Trademarks and Trade names

Lanham Act 15 USC § 1051 et seq

Indication of the source of goods and services; rights are acquired by use of the mark and registration with the Patent and Trademark Office (PTO) is prime facie evidence of validity and date of first use.

# Hidden Assets: Intellectual Property

## Copyrights

17 USC § 101 et seq.

Protects the expression of an idea in a fixed medium, rights are acquired by publishing the work, first in time is first in right, registration creates presumption of validity and ownership, after 5 years may be incontestable  
State law, i.e., no federal question jurisdiction for ownership dispute

# Hidden Assets: Intellectual Property

## Trade Secrets

Most difficult of all IP to protect.  
Rights can last forever.  
Finally, Pennsylvania has a statute, the Uniform Trade Secrets Act; 12 PA C.S.A. §5301 et seq.

# Hidden Assets

<b>Customer List</b>	Will only have value to competitors for a short time and only if they perceive that a competitor may buy it.
<b>Product Lines</b>	Saleable.
<b>Partnership Interests</b>	Very difficult to value. May be minority interests, joint ventures, capital stock, LLC interests, etc. Require much due diligence and research. (The Enron Off Balance Sheet Investments).

# Hidden Assets (Other)

- Litigation claims
- Tax refunds
- Intellectual property infringement claims
- Preferential payments to favored vendors or insiders
- Illegal stock redemptions
- LBO fraudulent conveyances

# Depositions in Aid of Execution

- Third party professionals: attorneys and accountants
- No immunity from testifying
- Privilege is generally not applicable
- Work product generally does not apply
- There is no attorney client privilege where the client used the attorney to perpetrate a fraud
- No accountant-client privilege under federal law
- Attorneys and accountants know where the bodies are buried

# LENDER LIABILITY CONCERNS

- Most lenders will tell you that the biggest problems with the assertion of the claim is the waste of money on attorneys fees.
- Sometimes the lender has more to worry about than just the cost and the time spent on the case. Once in a while, debtors get very lucky

# LENDER LIABILITY CONCERNS

- Equitable Estoppel
- Breach of Contract
- Equal Credit Opportunity Act
- Fair Debt Collection Act
- Truth in Lending Act, Reg. Z
- Negligence
- Negligent Misrepresentation
- Fraud
- Commercially Unreasonable Disposition of Collateral
- Breach of Good Faith and Fair Dealing

# LENDER LIABILITY CONCERNS

- Breach of Fiduciary Duty
- Conversion
- Intentional Interference with Prospective Business Advantage
- Defamation, False Light, Libel
- Abuse of Process
- Extortion
- Bankruptcy: Deepening Insolvency
- Racketeer Influenced and Corrupt Organization Act (RICO)

# E-MAIL AND ELECTRONIC DISCOVERY

- e-mail (electronic versions)
- e-mail headers
- e-mail archives
- logs of e-mail system usage
- data files created with word processing
- financial spreadsheets
- network logs
- audit trails
- accounting software databases
- tax return software databases
- electronic calendars,
- task lists
- telephone logs
- contact managers data bases