

Bankruptcy and the SBA Loan: 5 Issues You Must Know

Presented by:
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The Roadmap

- Bankruptcy Basics
- (1) Automatic Stay, including cash collateral
- (2) Companion Loans
- (3) Proofs of Claim
- (4) Credit Bidding
- (5) Plan Voting



Bankruptcy Basics

Bankruptcy

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The Broken Bench

Bankruptcy Basics

Chapter 13

- individual reorganization
- debt ceiling/regular income

Chapter 7

- straight liquidation

Chapter 11

- business reorganization
- high net worth individuals

Chapter 9

- nevermind...



Hold Everything: Automatic Stay



- Stays all judicial and administrative actions against debtor
- Stays ALL acts:
 - “to obtain possession of property of the estate”
 - OR
 - “to exercise control over property of the estate”
- Broadly Construed

Example: “You’ve got mail”

Relief from the Stay



- By motion
- Two grounds for the motion:
 1. “For Cause” – subject to interpretation

OR

 - 2a. The Debtor lacks equity; AND
 - 2b. The property NOT needed to reorganize
- Becomes a matter of valuation

Automatic Stay: Limits

Stay only applies to the Debtor

- Does NOT apply to: affiliates, guarantors, owners, managers, other insiders
- Exception: key employees

Stay relief only gets you relief from the Stay





Automatic Stay: SBA Issues

- Bankruptcy filing is a trigger event for liquidation status
 - In turn, triggers 1502 reporting
- Pre-charge off: must notify SBA Regional Loan Center
- Post-charge off: must notify SBA Treasury Offset Division
- Does not supersede site visit requirement
 - Need report
 - Need equipment inventory
 - Appraisals
 - Timeliness

Cash Collateral

Cash collateral: what is it?

- Lender's collateral in the form of cash
- Debtor cannot use cash collateral without Lender consent
- Court often needed to intervene
 - adequate protection requirement



Cash Collateral

- Disputes resolved via “first day” motion
 - Main factor in determining pace
- Control gives Lender enormous leverage
- No legal counterbalance
 - Lender’s only concerns are business concerns



Cash Collateral: SBA Issues



- Vital in most SBA loans
- Short term budgets require regular court appearances
- Going concern value maximizes recovery
- Avoids the need for DIP financing
 - Roll-Up's

Companion Loans

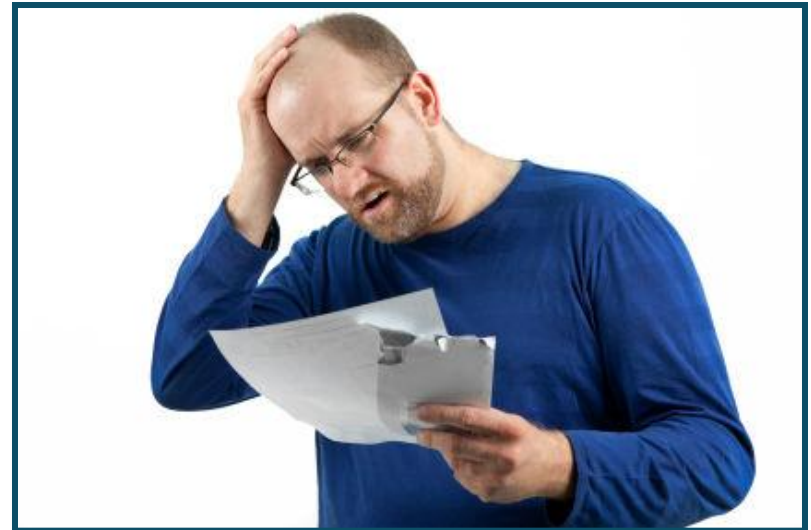


- Litigation plan recommended
 - Preferences require SBA approval
 - Preapproval for allocation of expenses
 - Preapproval for application of distribution
- SOP is silent on the topic
- Best practices: follow the collateral
- Alternately, apportion recoveries and costs *pro rata*



Proofs of Claim

- Pre-petition vs. post-petition
- Schedules vs. proof of claim
- Secured vs. priority vs. general unsecured



Proofs of Claim

- Court/Debtor/Case No.
- Creditor Name
- Attorney Contact
- Amount
- Priority
- Secured Claims
- Supporting documents
- Claims Agent

B 10 (Official Form 10) (12/08)		PROOF OF CLAIM
UNITED STATES BANKRUPTCY COURT Eastern District of Virginia		
Name of Debtor: Circuit City Stores, Inc.	Case Number: 08-35653	
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): American Express Travel Related Services Company, Inc.	<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.	Court Claim Number: (If known)
Name and address where notices should be sent: Eugene J. Chikowski, Esquire Flaster/Greenberg P.C. Eight Penn Center, 1628 J.F.K. Blvd., 15th Floor, Philadelphia, PA 19103 Telephone number: (215) 279-9382		Filed on: _____
Name and address where payment should be sent (if different from above): Telephone number: _____	<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.	<input type="checkbox"/> Check this box if you are the debtor or trustee in this case.
1. Amount of Claim as of Date Case Filed: \$ <u>18,285,401.00</u> If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4. If all or part of your claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.	5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount. Specify the priority of the claim. <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,425* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____).	
2. Basis for Claim: <u>credit & services provided</u> (See instruction #2 on reverse side.)		
3. Last four digits of any number by which creditor identifies debtor: _____ 3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		
4. Secured Claim (See instruction #4 on reverse side) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other Describe: <u>Card Acceptance Agreement & Corporate Purchasing Agreement</u> Value of Property: \$ _____ Annual Interest Rate: ____ % Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ <u>2,000,000.00</u> Amount Unsecured: \$ <u>16,285,401.00</u>		
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim		
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.) DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain: <u>See attached</u>	Amount entitled to priority: \$ _____ <small>*Amounts are subject to adjustment on 4/1/10 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>	
Date: 01/28/2009	Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any. Eugene J. Chikowski, Esquire	RECEIVED ONLY JAN 29 2009 KURTZMAN CARSON CONSULTANTS

Proofs of Claim

- Submits lender to bankruptcy court jurisdiction
 - Venue
- Bar date set in stone

- Filing required by SBA



- SBA also requires active case monitoring



- Lender must take action as necessary
- SBA requires Lenders to analyze schedules, SoFA, disclosure statement and plan
- Report suspected fraud to OIG

Credit Bidding

- Recent controversy started by *Philadelphia Newspapers*
 - “Keep It Local” campaign
 - Didn’t prevent bid, but made bad law
- Resolved by USSC in favor of lenders
 - *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*
- Credit bidding permitted in all bankruptcy sales



Credit Bidding: When



- No blanket requirement for SBA approval
 - BUT need prior SBA approval to take title to contaminated property or control of business handling hazardous substances
 - Consult list of NAICS codes if any doubt
- Credit bid required in all judicial foreclosures
- Credit bid required in all real property foreclosures
- SBA discourages credit bids in non-judicial personal property sales
 - Potential to chill bidding

Credit Bidding: How Much



- No specific formula
- Lender should consider: recoverable value, loan balance and need/ability to collect deficiency
 - Post-default appraisal required
- Bid cannot exceed loan balance
- Bid should be based on recoverable value
 - Must preserve ability to collect deficiency



Plan Voting

- All “impaired” classes vote
- Approval of impaired classes required for confirmation
- Plan can be “crammed down” throat of dissenting class, if:
 - Lender retains lien and receives deferred payments up to lender’s interest in collateral; or
 - Sale made subject to credit bid and lender’s lien attaches to sale proceeds; or
 - Lender provided the “indubitable equivalent” of its secured claim

Plan Voting



- SBA requires lenders to vote on Plan
- SOP specifically notes prior SBA approval required if plan will reduce principal balance of loan
- Other instances where prior SBA approval may be required:
 - Plan treats non-SBA loan more favorably
 - Discharge extended to include guarantor
- Notice to SBA also may be required:
 - Loan reamortized/restructured
 - Interest rate changed
 - Maturity date extended

Questions



Thank you!



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