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*LEVITIN*

**BUSINESS BANKRUPTCY**  
**Financial Restructuring and**  
**Modern Commercial Markets**



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ASPEN CASEBOOK SERIES

# BUSINESS BANKRUPTCY

## Financial Restructuring and Modern Commercial Markets

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*Georgetown University Law Center*



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*To Sarah for everything.  
You deserve all the credit.*

## PREFACE

The aim of this book is to provide an overview of the modern financial restructuring process. In so doing, the book aims to revitalize the traditional bankruptcy course with a healthy dose of “bankruptcy realism.” By this I mean that my goal is to provide a book that can be used to teach bankruptcy law as it actually lives in a broader legal ecosystem.

Bankruptcy realism has three components. First, it means teaching bankruptcy law as but one piece of the restructuring puzzle (even if it is the most important piece). My goal in this book is to broaden the scope of “bankruptcy law” as taught in law schools to include more than the in-court Chapter 11 restructuring process.<sup>1</sup> The traditional bankruptcy course is focused on big-B Bankruptcy lawyering, meaning representing either debtors or creditors in litigation in Chapter 11 cases (or in consumer bankruptcy cases in Chapters 7 and 13). The traditional bankruptcy course largely ignores the small-b bankruptcy lawyering, including the transactional work in Chapter 11 cases, as well as out-of court restructurings and bankruptcy-influenced transaction design.

The traditional big-B conception makes for a coherent class, but is, in my view, too narrow. It presents bankruptcy as a stand-alone process divorced from the non-bankruptcy world. I want students to come away from the course seeing how bankruptcy fits with non-bankruptcy restructuring. Chapter 11 is a very powerful tool, but it is not the only one in the restructuring toolbox. The importance of bankruptcy as a system can only be understood once one understands the legal limitations of out-of-court restructurings. At the same time, what is possible in out-of-court restructurings as a practical matter is shaped by the parties’ knowledge of what could happen in bankruptcy. Accordingly, the law of out-of-court restructuring, including private contractual limitations in loan syndications and securitizations, the Trust Indenture Act, and exit consent solicitations are properly part of the bankruptcy course, rather than a topic for a corporate finance class.

A second component of bankruptcy realism is teaching bankruptcy law as including not just the actual restructuring of financially distressed companies, but also transactions shaped by bankruptcy concerns. Thus, a second goal of this book

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1. This broader vision of bankruptcy law is not just a Chapter 11 issue. In another book, I make a parallel move relating to consumer finance, which prior to the creation of the CFPB was largely the bailiwick of consumer bankruptcy scholars, who examined the consumer finance system through the bankruptcy system, in part because of the availability of rich empirical data. The creation of the CFPB should underscore that bankruptcy filing is an exceptional behavior for consumers. Most consumers in financial distress do not file for bankruptcy, and most consumers are not in financial distress at any given time. Instead, the consumer finance system needs to be examined holistically from the front-end, not from the back, and not just from a consumer perspective, but from consumer, business, and regulatory perspectives.

is to introduce students to modern financial transactions and products that are shaped by bankruptcy law: asset securitization, repos and derivatives, syndicated loan structures and intercreditor agreements, intercompany guaranties, and leveraged buyouts. Just as small-b bankruptcy is properly part of a restructuring course, so too are transactions structures that are heavily driven by bankruptcy concerns.

In my experience, law students are desperately thirsty to understand complex modern financial transactions. They know that they'll encounter some, if not all, of these transactions in practice, and that law school is the only place they will get a systematic overview of the transactions. Unfortunately, despite the ubiquity of complex financing transactions, they receive no reliable coverage within the law school curriculum, yet they are vitally important to the world of practice students are preparing to enter. If these transactions are covered at all in law school, it is usually only passingly in secured credit or corporate finance classes. All too often, secured credit classes are hyper-focused on the details of UCC Article 9 at the expense of considering either actual deal documents or the dynamics of the modern lending marketplace, which no longer fits the model of local bank making a Main Street loan. To understand both mega- and middle-market lending, one needs to understand the transactional structure and institutional framework of these financial products.

The typical bankruptcy course touches on these transactions only to the extent necessary to explain bankruptcy law issues, such as the scope of the automatic stay or fraudulent transfers. This book gives these topics much more emphasis. The goal in this regard is to provide students with an introduction to what these products are and how they are shaped by bankruptcy law; this is not a text about financial product regulation. Because these transactions are all shaped by bankruptcy concerns, bankruptcy attorneys are often involved in these transactions, just as they are in out-of-court restructurings. Hopefully students will come away from this book with a sense of the broader world of what bankruptcy attorneys do and what bankruptcy law affects beside Chapter 11 itself.

The third component of bankruptcy realism is teaching the reality of modern business bankruptcy practice. Too often bankruptcy courses present a collection of restructuring principles and theories applied haphazardly to both consumer and business debtors without systematic treatment of bankruptcy practice's non-statutory features that are perhaps more important than statute in shaping restructurings. While there is "one Code to rule them all" the issues, economics, policies, and often statutory provisions involved in consumer bankruptcies are fundamentally different from those involved in business bankruptcies. The combined consumer-business bankruptcy course is the standard offering in American law schools, but I do not think it does a favor to either consumer or business bankruptcy to try to cover both topics in a single course. Both topics are sufficiently rich and complex to merit their own courses.

This book confines itself to business bankruptcies, and it attempts to provide a view of the Chapter 11 process that reflects the realities of modern Chapter 11 reorganizations. This is an aim that is intimately connected with understanding modern financial transactions and the institutional participants therein. Thus, topics such as bankruptcy sales, including sales procedures, valuation issues and methodologies, first-day orders and DIP lending agreements, and claims trading

and responses such as lock-up agreements, are given more extensive and integrated treatment than in existing texts. I have attempted to incorporate excerpts from actual transactional documents as much as possible so that students actually get some experience reading these real documents. Likewise, I have tried to provide more “color” about what is really going on in bankruptcy cases through the use of case studies that position particular bankruptcy issues within larger transactional fights.

It’s impossible to cover everything in a casebook of reasonable (or publishable) length, much less in a 3- or 4-credit course. Obviously some things have to get cut. Bankruptcy jurisdiction and international coordination didn’t make it. Bankruptcy jurisdiction gets some attention regarding venue and jurisdiction over personal injury and wrongful death claims, but bankruptcy jurisdiction is largely a federal courts topic (although largely ignored by federal courts scholars). Chapter 15 coordination issues are again a set of jurisdictional issues. Executory contracts get shorter shrift than in other texts. They are covered, but I do not believe that a deep dive into the morass of section 365 is worth the coin. Likewise, all the twists and turns of section 547(c) get limited coverage, despite being beloved of law professors for creating exceptions to exceptions, thus providing great exam questions. A final area that gets scant attention are the issues relating to the retention and regulation of bankruptcy professionals. For a practitioner these are quite important, but they are largely quite unrelated to understanding the system of financial restructuring and the transaction structuring that occurs in its shadow.

Adam J. Levitin  
August 2015



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One of the joys of my job is how I get to keep learning, and colleagues have played no mean part in this. Bill Bratton provided the most generous mentoring to me when I joined Georgetown as a junior professor. Bill was the one who made me first aware of the Trust Indenture Act and its background without which the absolute priority rule never really made sense, and Bill's avuncular wisdom in regarding corporate finance and scholarly and institutional norms was invaluable. I hope I can pass it on. Bob Thompson not only took over Bill's office, but also picked up on all aspects of the mentoring with unmatched patience. He is a treasured colleague, and I am in his debt. David Kuney and Peter Friedman, both part of Georgetown Law's amazing roster of adjunct faculty, provided valuable suggestions, infused with the knowledge gained from practice.

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