BANKRUPTCY AND DEBTOR-CREDITOR LAW

CASES AND MATERIALS

FOURTH EDITION

THEODORE EISENBERG

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To Lisa, Kate, Annie, Tommy

PREFACE

These materials attempt to probe general and unifying themes of debtor-creditor law. In covering Article 9 and state debt collection doctrine, they highlight and develop the connections between the two areas. The bankruptcy materials emphasize the relationship between bankruptcy law and state debtor-creditor law systems. In addition to the emphasis on basic themes of debtor-creditor law, I have tried to expand and upgrade the secondary materials relied upon to teach the subject. Existing debtor-creditor texts seem reluctant to deal in detail with scholarly ideas at the forefront of the field. Throughout the materials I have included excerpts from provocative or definitive works of recent scholarship.

The materials begin with Article 9 and Chapters 1–4 include the basic materials for an introduction to secured transactions. But the treatment of Article 9 also includes some interesting and challenging aspects of the subject that are not traditionally included in debtor-creditor teaching materials. *Leasing Consultants* (p. 200) combines questions about multi-state transactions, the nature of leasing, and the nature of chattel paper. *Michelin Tires (Canada) Ltd.* (p. 156) explores the rights of the assignee of security. Despite the late Professor Gilmore's important article—"The Assignee of Contract Rights and His Precarious Security"—and the importance of assignee transactions in modern financings, one rarely finds this topic treated in basic Article 9 materials. *Miller v. Wells Fargo Bank International Corp.* (p. 217) helps to place the Article 9 apparatus in perspective both by addressing an important modern area in which Article 9 does not operate and by showing how courts must struggle when there are no Article 9–like rules to govern the details of a secured transaction.

The question of how to teach state law remedies is a difficult one. The issues depend heavily on state law, yet no law school course can efficiently explore all the important nuances that arise in various state provisions. Both from the standpoint of "learning the rules" and from the standpoint of assessing how those rules operate as part of the debtor-creditor system, it is useful to teach a particular state's system of creditors' remedies. The notes therefore emphasize the treatment of debt collection in two states, New York and California. In addition to their commercial importance, these states present contrasting approaches to the codification of creditors' remedies. New York employs relatively few provisions to deal with questions that now occupy hundreds of pages of the California Code of Civil Procedure.

Some instructors may wish to replace or supplement the coverage of New York and California law in Chapters 6 and 7 by concentrating on the law of another state. The notes and questions should remain useful in exploring the laws of any state but some supplementary statutory materials

may be necessary. Other instructors may not wish to systematically study the laws of a particular state. The principal cases have been selected for their general interest and emphasis on the issues they raise should enable an instructor to highlight the central issues of debt collection without having to develop in depth any particular state's law.

Those who teach Article 9 as part of the debtor-creditor course (or whose students have knowledge of Article 9), may use Article 9 as a pedagogical foundation for the debt collection part of the course. One need not treat prejudgment attachment and post-judgment enforcement as subjects totally distinct from Article 9. Many, even most, attachment and enforcement problems correspond to problems that arise under Article 9. How does one create an interest in the debtor's property? May a creditor reach after-acquired property? May the creditor's interest be made secure as against third parties? Each of these inquiries, well known under Article 9, arises in the study of state law remedies.

The choice of California law as one vehicle for teaching state law remedies gives rise to further interaction between the Article 9 material and the material on state remedies. In many respects, California law now treats attachment and enforcement-of-judgments as variants of Article 9 security interests. New provisions in the California Code of Civil Procedure expressly adopt most of the key terms employed by Article 9. Article 9's system of classifying property is completely adopted. The California provisions also rely on Article 9 concepts to resolve priority battles, and contain an Article 9–like filing system. In sum, much of California's remedial system now presents an express unifying theme between Article 9 and creditors' remedies.

Chapter 6, entitled "Limitations on Debtors' Avoidance Efforts," has further goals. It tries to establish a theme, suggested by the title, that links several doctrinal areas within creditors' remedies. This theme is used later in Chapter 12 to explore the relationship between fraudulent conveyance doctrine and equitable subordination. See Clark, "The Duties of the Corporate Debtor to Its Creditors," 90 Harv.L.Rev. 505 (1977). The bulk transfer provisions contained in Article 6 of the U.C.C. also fit comfortably within the theme of protecting creditors against misbehavior by debtors.

I also believe that materials on fraudulent conveyance law may be reoriented towards modern problems that affect a wide range of corporate transactions. For example, most existing materials do not cover the validity of intercorporate guaranties, a fraudulent conveyance problem faced by every major (and many minor) law firms. *Zellerbach Paper Co. v. Valley National Bank* and *In re Ollag Construction Equip. Corp.* are included in Chapter 6 as vehicles through which the intercorporate guaranty problem may be explored.

Chapters 9–17 cover bankruptcy. It often seems forgotten that bankruptcy law is not a totally independent system of substantive federal law through which claims of creditors are handled. At bottom, bankruptcy is

little more than a federal procedure through which to vindicate state-created rights. The bankruptcy portions of the book are designed to constantly probe this theme. Beginning with issues dealt with early in the bankruptcy chapters (for example, involuntary bankruptcy proceedings in Chapter 10) the materials introduce and pursue the central theme of the relationship between federal and state law in bankruptcy. As the federal-state theme has important implications for questions of jurisdiction and forum, I have included in Chapter 17 materials on bankruptcy court jurisdiction.

There is, of course, more to bankruptcy than a single theme. If creditors view it in part as a mechanism for adjusting state law rights, debtors enjoy the benefits of discharge that only federal bankruptcy law provides. In probing the discharge theme (Chapter 13), I have tried, through the Weistart excerpt, to encourage teachers and students to place the bankruptcy discharge against the larger background of contract law to which it is so fundamentally related.

Passage of the new Bankruptcy Act presents the opportunity to explore at least one new theme—the extent to which the new act in fact improves upon the old one. As the materials in Chapter 10 on involuntary bankruptcy proceedings and the assets of the estate suggest (see also the materials covering the new preference exceptions in Chapter 14), it is not clear that the new act always captures the spirit of what a bankruptcy law should be better than the old act did.

The new act strengthens one theme that is both practically important and theoretically interesting. To what extent should a creditor be able to choose a form of transaction that avoids potential entanglements with the debtor's trustee in bankruptcy? Many provisions of the new act operate to keep non-bankrupt parties unwillingly locked into deals with bankrupts (see §§ 541, 362, 365—Chapters 10 and 11). Yet other provisions and decisions leave creditors some room to plan to avoid dealing with the debtor in the event of bankruptcy. The weapons employed to assist creditors in avoiding the trustee include letters of credit, state trust law, escrow deposits, and other devices. Despite the common goal of all these devices, one usually finds little specific treatment of them and no unifying notes on the general theme of avoiding dealings with the trustee. See Chapter 11D.

In assembling these materials I have benefitted from the works of many authors. In addition to those listed in the "Acknowledgments" section, I would like to note my debt to the following authors and works: V. Countryman, Cases and Materials on Debtor and Creditor (2d ed. 1974), D. Epstein & J. Landers, Debtors and Creditors (2d ed. 1982), S. Riesenfeld, Creditors' Remedies and Debtors' Protection (2d ed. 1979), and W. Warren & W. Hogan, Cases on Debtor–Creditor Law (2d ed. 1981). A different sort of debt is owed to L. Eisenberg & K. Hall, Chicken Jokes and Puzzles (1978).

I also would like to thank Brian Gaj, Cornell Law School Class of 1984, and James McShane, Cornell Law School Class of 1985, for their able research assistance. Generous financial support was provided by Dean Peter Martin and the Cornell Law School. My deepest thanks must go to Karen Wilson for her cheerful, efficient, and skillful preparation of the manuscript.

Course Coverage. These materials were developed while teaching a four semester-hour debtor-creditor law course. In recent years I have omitted the material covered by Chapters 5 and 8 and have excluded selected other topics. I have not taught the materials in Chapter 17. In addition, some of the materials may be more suitable for background reading than for extensive class coverage. I usually assign Chapter 1 prior to the first class and cover it only on that day. I assign most of Chapter 9 as background reading. In the years that I have reached the material in Chapter 16, I assign the Bonbright excerpt as background reading and do not cover it in class. In some recent years, I have done the same with the Schwartz excerpt at the beginning of Chapter 12.

For those who do not cover Article 9 in a debtor-creditor course, Chapters 5–17 provide more than enough material for a three semester-hour course on other aspects of debtor-creditor law. For those who teach a course on secured transactions, there is enough material for a two semester-hour course and, with selected additions from the bankruptcy provisions that most affect secured creditors, there may be enough material for a three hour course.

Statutory Supplement. I recommend that instructors assign The Foundation Press statutory supplement entitled, "Commercial and Debtor–Creditor Law: Selected Statutes" (available spring 1984). The supplement has been designed to take account of this book's coverage and includes the U.C.C., the Bankruptcy Act, and all relevant state laws covered in Chapters 6 and 7. The supplement also includes all statutory provisions needed in teaching most courses on commercial law. Therefore, students who purchase it should not find it necessary to purchase a second statutory supplement for other commercial law courses.

THEODORE EISENBERG

Ithaca, New York
November, 1983

PREFACE TO THE FOURTH EDITION

As in the prior three editions, this book continues to treat in one volume secured transactions, enforcement of judgments, and bankruptcy. The book remains one of the few sources to integrate these three areas. The bankruptcy materials in this edition include a substantial reworking of the Chapter on consumer bankruptcy, with coverage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. New bankruptcy reorganization materials include coverage of the major automobile manufacturer bankruptcies through inclusion of the *Chrysler* case and coverage of settlement as a possible exception to absolute priority through inclusion of the *Iridium* case. The Article 9 materials now include a British case raising issues of trustee duties in the context of multi-tiered investments in which the trustee acts on behalf of both senior and junior secured creditors. The enforcement-of-judgment materials add a recent judicial interpretation of New York's enforcement-of-judgment statute.

The Foundation Press's statutory supplement, "Commercial and Debtor–Creditor Law: Selected Statutes," which is periodically updated, continues to supply all statutory materials needed in courses based on this book.

THEODORE EISENBERG

Ithaca, New York
November 2010

EDITING CONVENTIONS AND ABBREVIATIONS

Unless otherwise indicated, footnotes contained in quoted material, including cases, retain their original numbers. Footnotes added by the author are designated by letters of the alphabet. Footnotes and citations in quoted materials have been deleted without indication. Citation forms sometimes have been modified, also without indication. Ellipses indicate the deletion of textual material.

To conserve space and enhance readability, the following abbreviations are employed:

Commission Report—Report of the Commission on the Bankruptcy Laws of the United States, H.R.Doc. No. 93–137, pts. I & II, 93d Cong., 1st Sess. (1973)

Gilmore—G. Gilmore, Security Interests in Personal Property (1965) (2 vols.)

House Report—H.R.Rep. No. 95–595, 95th Cong., 1st Sess. (1977)

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