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# **COMMERCIAL BANKRUPTCY LITIGATION**

**Second Edition**

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**JONATHAN P. FRIEDLAND**

**2012**

**WEST®**

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SECOND EDITION

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By

JONATHAN P. FRIEDLAND

2012

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## DEDICATION

Michele, thank you for putting up with me. Sophie, Julia, and David: you too. I love you all very much.

**EDITOR-IN-CHIEF; PRINCIPAL AUTHOR**

Jonathan P. Friedland

**EXECUTIVE EDITOR**

Elizabeth B. Vandesteeg

## ABOUT THE AUTHOR

### JONATHAN P. FRIEDLAND

Jonathan Friedland is a partner with Levenfeld Pearlstein LLC. He is a member of both the firm's corporate and litigation practice groups. He is licensed to practice law in Arizona, Illinois, New Jersey, and New York.

Jonathan's corporate work includes serving as outside general counsel to a number of closely held businesses and their principals and a robust practice representing private equity funds and others in their M&A activities. The wide range of corporate issues he advises clients on include: fiduciary duties; structuring issues; credit negotiations; general contract issues; and employee matters. He is on the editorial board of *The Corporate Counselor*. He was recognized in 2011 as an Illinois "superlawyer" in the area of Business/Corporate law.

Jonathan also leads the firm's Restructuring & Insolvency Service Group. He has extensive experience in guiding companies and their constituents through a variety of financially challenging situations. He represents banks, debtors, official and ad hoc creditor committees, and other stakeholders in bankruptcy cases, assignments for the benefit of creditors, receiverships, and out-of-court workouts. In addition to this book, Jonathan is lead author of *Strategic Alternatives for Distressed Businesses*, an 800-page treatise. He has litigated the full array of matters that arise in bankruptcy cases, including involuntary, discharge, dismissal, lift stay, preference, fraudulent conveyance, equitable subordination, substantive consolidation, and confirmation issues. Jonathan is a member of the board of directors of the American Bankruptcy Institute, where he serves as the co-executive editor of its flagship publication, the *ABI Journal*, and he is education co-chair of the Chicago/Midwest chapter of the Turnaround Management Association. He has been repeatedly recognized as an Illinois "superlawyer" in the areas of Bankruptcy & Creditor/Debtor Rights.

Jonathan's Chapter 11 debtor representations have included: Hydraulic Technologies, Inc (Ohio-based heavy

manufacturer); Musicland Corporation (Minnesota-based 1000-store music retailer); HomeLife Corporation (Illinois-based furniture retailer and Sears spin-off); Polymer Group, Inc. (North Carolina-based polymer manufacturer); and Globe Holdings, Inc. (Boston and Alabama-based spandex manufacturer). His Chapter 11 committee representations have included Renaissance Residential; New Creative Enterprises; InGEAR Corporation; Universal Food & Beverage, Inc; and Capital Engineering & Manufacturing Company. He also represents numerous banks in connection with their workouts of troubled loans and bankruptcy matters.

Jonathan has written more than 100 articles and chapter treatises on various legal topics and has spoken at dozens of legal conferences. He is AV rated by Martindale Hubbell, holds a 10/10 rating on the attorney rating website AVVO, and has received several other similar distinctions. Jonathan has been profiled, interviewed, and/or quoted in a number of publications, including *Buyouts Magazine*; *Smart Business Magazine*; *The M&A Journal*; *Inside Counsel*; *LAW360*; *Business Week.com*; *The Bankruptcy Strategist*; *Dow Jones Daily Bankruptcy Review*; *Bankruptcy Court Decisions*; *Dow Jones LBO Wire*; and *The Daily Deal*.

Jonathan graduated from the State University of New York at Albany, magna cum laude, in 1991 (after three years of study) and from the University of Pennsylvania Law School in 1994. He clerked for a federal judge before entering private practice, served as an Adjunct Professor of Strategic Management at the University of Chicago's Graduate School of Business in 2008 and 2007, and was the 2006 Clayton Center for Entrepreneurial Law Visiting Professor of Business Law at the University of Tennessee College of Law. Jonathan was a partner with Kirkland & Ellis before joining Levenfeld Pearlstein.

## ABOUT THE CONTRIBUTORS

### PHILIP D. ANKER

Philip D. Anker is a partner in the New York office of the law firm of Wilmer Cutler Pickering Hale and Dorr LLP. He is Vice Chair of the firm's Bankruptcy & Financial Restructuring Practice Group. Among other honors he has received, Mr. Anker has been selected as one of the "Best Lawyers" in Bankruptcy and Creditor-Debtor Rights law in *The Best Lawyers in America* for each of the last five years.

Mr. Anker represents the full panoply of parties in Chapter 11 cases and out-of-court workouts, including debtors, trustees, creditors committees, bank groups, and other secured creditors, unsecured creditors, purchasers of assets, and parties in major bankruptcy litigation. He has been active in many leading cases, including *Adelphia Communications Corp.*, *Adelphia Business Solutions*, *Agway*, *Calpine*, *CTC*, *Congoleum*, *Global Crossing*, *Homelife*, *Northwest Airlines*, *Refco*, *Startec*, and *WorldCom*. In the arena of bankruptcy litigation, he has successfully argued four cases in the U.S. Courts of Appeal, prevailing each time: *Eastman Kodak Co. v. Wachovia Bank, N.A.*, 456 F.3d 1277 (11th Cir. 2006); *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006); *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13 (1st Cir. 2002); and *AT&T Universal Card Servs. v. Mercer*, 246 F.3d 391 (5th Cir. en banc 2001). He has also successfully defended in bankruptcy and district court massive fraudulent transfer and related litigation, obtaining dismissals of complaints in cases such as *Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 80 (S.D.N.Y. 2008), and *Kirschner v. Grant Thornton LLP*, 2009 WL 996417 (S.D.N.Y., Apr. 14, 2009).

Mr. Anker is a frequent speaker at seminars on bankruptcy law and bankruptcy litigation. He graduated in 1982, with highest honors, from the National Law Center at The George Washington University, where he was Editor-in-Chief of *The George Washington Law Review* and a member of Order of the Coif. After graduating from law school and before joining WilmerHale, he clerked for the Honorable



Paul H. Roney, United States Court of Appeals for the Eleventh Circuit.

## **ERIN N. BRADY**

Erin Brady is Of Counsel in the Business Restructuring and Reorganization Practice for Jones Day. She focuses her practice on the representation of debtors, creditors committees, trustees, individual creditors, and others in chapter 11 bankruptcy cases. Erin has extensive experience in bankruptcy-related litigation, asset sales and acquisitions, and chapter 11 restructurings involving a wide range of industries, including automotive, finance, wholesale distribution, manufacturing, retail, entertainment, restaurant, and office supply distribution. Erin received her J.D. from Pepperdine University summa cum laude.

Erin's recent representations include the successful representation of 430 non-agent lending institutions in defending against and ultimately obtaining dismissal of more than \$4.5 billion in preference, fraudulent conveyance, equitable subordination, and equitable disallowance claims raised by the Adelphia Recovery Trust, representation of the post-confirmation trust of Fleming Companies in district court and appellate litigation involving claims of copyright infringement, trade secret misappropriation, and RICO, and representation of the chapter 7 trustee of Axiom International, Inc. in the investigation and settlement of significant claims asserted against Axiom's former secured lenders.

Prior to joining Jones Day, Erin represented Musicland Holdings in consummating its \$100 million asset sale to Trans World Entertainment Corporation and Consecro in consummating the \$1 billion sale of its finance unit in chapter 11 and confirming its plan of reorganization.

Erin is a member of the State Bar of California, and the American Bankruptcy Institute. She is also active in the Los Angeles chapter of the International Women's Insolvency and Restructuring Consideration, recently completing a four year board term. Erin has been repeatedly named and designated in the Southern California Super Lawyers directory and Madison's Who's Who of Executives and Professionals.

## **PHILLIP BUFFINGTON JR.**

## ABOUT THE CONTRIBUTORS

Phil joined Adams and Reese LLP in 2011 in the Jackson, Mississippi office. His practice is focused primarily on the representation of financial institutions and business entities in regulatory, transactional and litigation matters. As a member of the Transaction and Corporate Advisory Group, he practices in the areas of banking and corporate transactions, bankruptcy, real estate and commercial litigation.

Phil has served on the Adjunct Faculty Staff of Mississippi College School of Law (Banking Law). He is also a frequent faculty speaker and presenter for continuing legal education and other instructional courses on topics related to his practice, including, foreclosures, workouts and forbearance, entity formation and secured transactions. Phil was appointed to the Corporation Laws, Limit Liability Company Laws and UCC/Debtor-Creditor Laws Policy and Research Committees of the Mississippi Secretary of State's Committee on Business Reform.

Phil received his B.B.A. (Banking and Finance/Insurance) from the University of Mississippi in 1981. He attended Mississippi College School of Law, graduating in 1984 with his J.D. Phil is a Member of the American Bar Association (Banking Law Committee), American Bankruptcy Institute, Inc, and Mississippi Bankruptcy Conference, Inc.

## LAUREN M. BUONOME

Lauren Buonome is an associate with the Business Restructuring and Reorganization Practice for Jones Day. She received her J.D. from St. John's University. Her practice focuses on business restructuring and reorganization. She has represented various major constituencies in both out-of-court and in-court restructurings and reorganizations, including debtors, lenders, bondholders, unsecured creditors, and other debt and equity investors. Her experience in restructuring matters includes the representation of clients in connection with distressed mergers and acquisitions. Lauren's practice also involves complex bankruptcy litigation, where she has advised reorganized debtors and lender groups in a variety of adversary proceedings and contested matters, including, among others, preference actions and fraudulent conveyance proceedings.

Lauren is a member of the New York bar association.

**KENDALL CAMUTI**

Kendall Camuti is a member of Venable LLP's Bankruptcy and Creditors' Rights Group, which was named among the top five bankruptcy groups in the nation by BankruptcyLaw360 in 2010. Mr. Camuti has represented individual and commercial debtors, secured and unsecured creditors, creditors' committees and bankruptcy trustees in a variety of matters, including bankruptcy estate administration, the chapter 11 plan process, claims reconciliation and objections, preference actions, fraudulent conveyance actions, contract disputes and the enforcement of creditors' rights both in and outside of bankruptcy.

**DAVID CARICKHOFF**

David Carickhoff is a partner in Blank Rome LLP's Business Restructuring and Bankruptcy Group and is resident in the firm's Wilmington, DE office. Mr. Carickhoff represents debtors, creditors' committees, asset purchasers, individual creditors and directors and officers in chapter 11 proceedings and out-of-court workouts. Chambers USA describes him as "a diplomatic lawyer who has the experience to provide 'additional firepower to the practice.'"

His chapter 11 debtor representations include Nova Biosource Fuels, Inc. (refiner of biofuels), Midway Games Inc. (developer and publisher of video games), Pacific Crossing Ltd. (owner and operator of trans-Pacific fiber-optic cable system), STAR Telecommunications, Inc. (long-distance telecommunications provider), Integrated Telecom Express, Inc. (integrated circuit provider) and HomeLife Corporation (furniture retailer with over 120 stores). Mr. Carickhoff's recent committee representations include Solyndra LLC (solar power systems manufacturer), American Community Newspapers (community newspaper publisher), MediCor Ltd. (medical device company), Mortgage Lenders Network USA, Inc. (sub-prime mortgage lender and loan servicer), and Nobex Corp. (development stage biopharmaceuticals company).

**ANDREW CURRIE**

Andrew Currie is a partner in Venable LLP's Bankruptcy and Creditors' Rights Group, which was named among the top five bankruptcy groups in the nation by Bankruptcy-Law360 in 2010. Mr. Currie concentrates his practice on debt restructuring, reorganization, insolvency, general bankruptcy matters and transactional work. Mr. Currie represents commercial debtors, creditors' committees and individual unsecured and secured creditors in all aspects of bankruptcy and reorganization. Mr. Currie has been heavily involved in negotiating, structuring and closing complicated, multi-million dollar DIP financing and cash collateral transactions on behalf of major lenders and debtors across many industries, and has been instrumental in liquidating and restructuring companies with more than \$1 billion in debt. Mr. Currie also has experience managing distressed investments, conducting contested § 363 sales and going out-of-business sales, negotiating and managing sales of assets in and outside bankruptcy court, negotiating and pursuing known and unknown assets in remnant deals, negotiating, reconciling and objecting to claims, litigating preference demands, and working on out-of-court restructuring and assignments for the benefit of creditors.

Mr. Currie has represented the debtors in the Chapter 11 proceedings of Smitty's Building Supply, US Office Products Company and Iridium LLC. He has acted as counsel to various secured and unsecured creditors, lenders, bondholders, purchasers of assets, and interested parties in Chapter 11 cases such as Budget Group, Inc., Exide Corp., LTV Steel Company, Bethlehem Steel Corp., Federal-Mogul Global, HomeLife Corporation, National Steel Corporation, Hayes Lemmerz International, Inc. and Ogden New York Services, Inc.

In addition to Mr. Currie's experience as a bankruptcy and restructuring practitioner, Mr. Currie is a guest lecturer on bankruptcy and restructuring at Georgetown University's McDonough School of Business, an Ambassador for the American Bankruptcy Institute, and a contributing editor for Norton Bankruptcy Law and Practice, Commercial Bankruptcy Litigation, 2011 Edition, and Inside the Minds: Creditors' Rights in Chapter 11 Cases, 2011 Edition.

**SALLY E. EDISON**

Ms. Edison is a partner in the Pittsburgh office of McGuireWoods LLP, concentrating her practice in the areas of commercial bankruptcy, insolvency, and creditors' rights. Her clients include trade creditors, secured creditors, debtors, small businesses, major corporations, court-appointed committees, and she represents former officers and directors in bankruptcy proceedings in insurance coverage and indemnification matters. Ms. Edison is also national bankruptcy counsel to multi-national group of manufacturing and service companies. She is a frequent speaker at bankruptcy-related seminars and she is a guest lecturer on bankruptcy topics at the University of Pittsburgh's School of Law and School of Business.

Ms. Edison's expertise in bankruptcy has earned her numerous awards such as being named a "Pennsylvania Super Lawyer" and a "Pennsylvania Super Lawyer Rising Star" by Law and Politics magazine. For her community involvement, she was also named one of Pittsburgh's "40 under 40" by Pittsburgh Magazine.

She received her J.D. from the University of Pittsburgh School of Law and a B.A. from Indiana University.

### **EUGENE J. GEEKIE, JR.**

Eugene J. Geekie, Jr. is a partner in the Chicago office of Schiff Hardin LLP, and a member of the bar of the States of Illinois, New York, and Missouri. He concentrates his practice in bankruptcy and commercial litigation, creditors' rights, and corporate restructuring, representing committees, trustees, debtors, examiners, financial institutions, secured and unsecured creditors, as well as business entities and individuals in a variety of bankruptcy and commercial litigation matters. Mr. Geekie is a member of the American Bankruptcy Institute and the Turnaround Management Association, is a Contributing Editor of Norton Bankruptcy Law and Practice (3d ed.), and is a frequent writer and speaker. He is a cum laude graduate of St. Louis University School of Law, and a summa cum laude graduate of St. Louis University.

### **CHRISTOPHER M. HEALEY**

## ABOUT THE CONTRIBUTORS

Christopher Healey is an associate with the Business Restructuring and Reorganization Practice for Jones Day. His practice focuses on corporate restructuring and bankruptcy-related matters, including chapter 11 proceedings, out-of-court restructurings, and bankruptcy litigation. He has represented debtors, secured and unsecured creditors, creditors' committees, trusts and trustees, bank groups, and other parties in interest in a variety of matters. These representations include clients in the telecommunications, financial, manufacturing, and entertainment industries. Chris received his J.D. from Duke University and B.A. from Rutgers University.

Chris's experience has exposed him to a wide range of bankruptcy topics and issues, including the confirmation and implementation of chapter 11 plans of reorganization, real estate issues, fraudulent transfer and preference claims, cramdown, enterprise valuation, complex litigation, and creditors' rights. Chris's recent representations have included debtor in possession Plant Insulation Company in its asbestos-related chapter 11 case, the Ad Hoc Committee of Bondholders in Chemtura Corporation's chapter 11 case, the post-confirmation trust of Fleming Companies in claims mediation, tort litigation, and related proceedings; and East West Bank in its successful appeal of a plan confirmation order in the chapter 11 case of Ravello Landing, LLC.

Chris is a member of the bar associations of California and Ohio and was recently named a "Rising Star" in the 2012 edition of Ohio Super Lawyers.

### JESSICA S. KUMAR

Jessica S. Kumar is an associate at Skadden, Arps, Slate, Meagher & Flom LLP, where she represents major U.S. and international corporations in complex business reorganizations, acquisitions and divestitures, typically in distressed situations.

Ms. Kumar has served as counsel in many significant business reorganizations including in Chapter 11 cases for CIT Group, Inc., the largest prepackaged bankruptcy solicitation ever, Interstate Bakeries Corporation, one of the largest wholesale bakers and distributors of fresh baked bread and sweet goods in the United States, and Circuit City Stores, Inc.. in connection with one of the nation's largest

retail liquidations.

Ms. Kumar also represented Black Diamond Capital Management, LLC, in connection with the Chapter 11 case filed by Bear Island Paper Company and the CCAA cases filed by White Birch Paper Company in Canada and the subsequent credit bid and purchase of the debtors' business. Ms. Kumar has also represented clients with respect to a wide array of corporate transactions in distressed situations.

## JOHN K. LYONS

John K. Lyons, a partner at Skadden, Arps, Slate, Meagher & Flom LLP, represents major U.S. and international corporations in complex business reorganizations, acquisitions and divestitures, typically in distressed situations.

Mr. Lyons has served as counsel in many significant business reorganizations including in Chapter 11 cases for VeraSun Energy Corporation, one of the largest ethanol producers in the United States; Delphi Corporation, a leading global technology innovator and Tier 1 supplier to nearly every major automotive original equipment manufacturer; Interstate Bakeries Corporation, one of the largest wholesale bakers and distributors of fresh baked bread and sweet goods in the United States; Exodus Communications, Inc., the world's largest Internet data center provider, in the sale of its international business to an affiliate of Cable & Wireless plc for \$575 million through a fast-track Chapter 11 process; and Einstein/Noah Bagel Corp., a national bagel restaurateur with more than 400 stores.

Mr. Lyons also represented the special committee of board of directors of ShengdaTech, Inc. in connection with its Chapter 11 case to complete the committee's investigation of ShengdaTech and to safeguard assets. He also advised Montgomery Ward, LLC in connection with the nation's largest retail liquidation that generated proceeds in excess of \$1 billion; US Airways, Inc., one of the nation's largest airlines, in the successful restructuring of its business in the wake of the events of September 11 and the economic downturn in the airline industry; and Favorite Brands International, Inc., a manufacturer of candies and confectioneries, in connection with its successful restructuring and consequent sale of its business.

Mr. Lyons also has represented clients with respect to a wide array of corporate transactions in distressed situations, including the representation of Calliope Capital Corporation and affiliate lenders in connection with the Chapter 11 case filed by PPM Technologies and subsequent credit bid purchase of PPM's business; Verizon Capital Corp. in the restructuring of two investments in power facilities in Massachusetts and Mississippi; and Faurecia N.A., a French automotive conglomerate, in the purchase of AP Automotive, Inc., a large American automotive parts supplier.

Mr. Lyons repeatedly has been listed as a "leader" in the corporate restructuring field in Chambers USA: America's Leading Lawyers for Business. He also was selected as a "leading lawyer" for commercial bankruptcy and workout law by the Leading Lawyers Network and in 2003 was named by Turnarounds & Workouts as one of the top dozen "Outstanding Young Bankruptcy Lawyers" in the nation.

## **LANCE E. MILLER**

Lance Miller is an associate with the Business Restructuring and Reorganization Practice for Jones Day. His practice focuses on bankruptcy, corporate reorganization, and complex bankruptcy litigation. He represents major constituencies in restructurings and reorganizations, including debtors, lenders and bank groups, bondholder committees, and unsecured creditors. Lance received his J.D. from Boston University School of Law, cum laude.

Lance's recent experience has involved creditor representations in the chapter 11 cases of Cynergy Data, Quebecor (World) USA, and Taylor, Bean & Whitaker Mortgage Corp., representation of an ad hoc committee of bondholders in the chapter 11 case of Chemtura Corporation; representation of the chapter 7 trustee in Axiom International, Inc., and representation of East West Bank its successful appeal of a plan confirmation order in the chapter 11 case of Ravello Landing, LLC. Prior to joining Jones Day, Lance represented the chapter 11 debtors in Solidus Networks d/b/a Pay By Touch, a large payment processing and biometric payment solutions company, and Leiner Health Products, a leading manufacturer of store brand vitamins, minerals, and nutritional supplements.

From 2005 through 2007, Lance served as a judicial law clerk for the Honorable William T. Thurman, chief judge for



the Bankruptcy Court for the District of Utah. He is a member of the American Bankruptcy Institute and the bar associations in New York, California, and Utah. Lance is the author of several publications, including several articles in the Norton Annual Review of Bankruptcy Law and a chapter on non-dischargeability actions in Bankruptcy Litigation.

## GEORGE N. PANAGAKIS

George Panagakis represents clients in complex business reorganizations, debt restructuring and insolvency matters. Mr. Panagakis advises companies experiencing financial difficulties as well as lenders, creditors, purchasers or other parties with an interest in such companies.

Mr. Panagakis has been lead counsel in numerous Chapter 11 cases, including Amcore Financial, Inc.; Avado Brands, Inc.; Eagle Food Centers, Inc.; Enesco International, Inc.; Hartmarx Corporation; Ingersoll International, Inc.; Master Graphics, Inc.; Neumann Homes, Inc.; and Primus Telecommunications. Mr. Panagakis also has led the successful out-of-court restructuring of a major beverage producer, a major communications company, a major steel company and a tier-one auto supply company. In addition, Mr. Panagakis has had primary responsibilities in the restructuring of a host of other companies, including Comdisco, Inc.; County Seat Stores, Inc.; Delphi Corporation; Friedman's Inc.; Service Merchandise, Inc.; and USN Communications, Inc.

Mr. Panagakis also has represented creditors and other parties in interest in troubled situations. In particular, Mr. Panagakis has represented CIT Group, Credit Suisse First Boston, Deutsche Bank, J.P. Morgan Chase, Nuveen Investments and other lenders as agent or significant participant in both debtor-in-possession and out-of-court rescue loans, as well as Silver Point Capital in connection with the out-of-court restructuring of one of its portfolio companies. Mr. Panagakis also has represented the largest creditor group in Johns-Manville Trust restructuring and has represented official committees in the American Home Patients, Inc.; Ben Franklin Stores, Inc.; and Nutritional Sourcing Inc. Chapter 11 cases as well as several informal creditor committees. In addition, Mr. Panagakis has represented various parties in connection with the purchase of distressed companies or their