



FARELLA BRAUN + MARTEL LLP

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Insurance in Bankruptcy:

Preserving and Maximizing Insurance Assets of a Bankrupt Entity

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Program Outline

- Pre-Bankruptcy Considerations
- Effect of Automatic Bankruptcy Stay On Insurance Coverage, Violation Risks
- Risks of Losing Coverage in Bankruptcy
- D&O Liability Coverage in Bankruptcy
- Key Coverage Issues in Bankruptcy, Including The Insured v. Insured Exclusion

Pre-Bankruptcy Considerations

- Risk and pitfalls in insurance issues involving distressed companies (e.g., coverage loss, court sanctions)
- Ensuring payment of insurance premiums prior to anticipated bankruptcy filing
- Coverage exceptions in bankruptcy
- Planning for quick relief from automatic stay in insured's bankruptcy case

Effect of Automatic Bankruptcy Stay on Insurance Claims

- Bankruptcy basics
- Automatic stay = statutory injunction upon filing of bankruptcy case
- Automatic stay prohibits any action against debtor or debtor's property interests
- Stay interpreted broadly (including any acts affecting debtor's contract rights)

Effect of Automatic Stay in Bankruptcy on Insurance Claims

- Automatic stay applies to any rights or interests of debtor under insurance policy
- Automatic stay prevents collection of pre-bankruptcy judgment against insurance
- Automatic stay stops insurance beneficiary from pursuing claim against policy
- Stay prevents officers and directors from coverage of defense costs and liability

Effect of Automatic Stay in Bankruptcy on Insurance Claims

- Acts in violation of automatic stay are “void ab initio” (deemed legally ineffective)
- Stay violators subject to sanctions, including damages and legal expenses
- Prevent stay violations by obtaining relief from automatic stay from bankruptcy court

Effect of Automatic Stay in Bankruptcy on Insurance Claims

- Seek stay relief by agreement or motion
- Stay relief agreement to pursue insurance generally based on promise not to proceed against debtor's other assets
- Stay relief for coverage or defense costs often capped if aggregate claims expected to exceed policy limits

Directors & Officers' Rights to Coverage

- Directors and officers may violate the automatic stay by seeking coverage under a D&O policy
- Does the bankruptcy debtor have an interest in the proceeds of a particular D&O liability policy?
- Side A only vs. Side ABC policies
- Where both debtor and directors and officers potentially have direct interests in a D&O policy, the law is unclear as to whether and, if so, to what extent, the policy proceeds are estate property.

The Insured v. Insured Exclusion

- Insured vs. insured exclusion bars coverage for claims by one insured against another insured under the same policy (e.g., a direct claim by the company against a director or officer)
- Applicability of exclusion in bankruptcy
- Exceptions for certain actions (e.g., by bankruptcy trustee against Ds & Os)
- Strategies for preventing lack of coverage due to insured vs. insured exclusion

Other Key Coverage Issues in Bankruptcy

- “Vanishing coverage” risks
- Reimbursement and subrogation claims in bankruptcy
- Priority claims for post-bankruptcy insurance coverage

Future Webinars

- June 23--Opportunities and Pitfalls in Acquiring Distressed Assets
- July 14--Restart Techniques for Technology and Intellectually Property-Driven Companies
- July 28--Employment Issues for Financially Troubled Companies
- August 4--Recapitalizing, Repositioning, Restructuring or Reorganizing Opportunities in the Wine Industry

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