

# *A Carnival of Information*



**27th**  
**annual**  
ACCOUNTING SHOW

September 19-21, 2012

Broward County Convention Center / Ft. Lauderdale



# 27<sup>th</sup> Annual Accounting Show September 20, 2012 Ft. Lauderdale

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	Susan Heath Sharp Attorney/Stichter, Riedel, Blain & Prosser, PA	

<b>2011 - 2012 Accounting Shows Committee</b>
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# ***Employment Law Update***

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*Laura Prather*

**Laura E. Prather**  
**Shareholder**  
**Trenam Kemker**

Laura Prather joined the firm in 1994 and has been a Shareholder since 1997. She leads the firm's Employment Law Practice Group.

**Additional Practice Areas:**

- Sexual Harassment and Discrimination Investigations
- Wrongful Termination and Whistleblower Claims
- Employment Agreements and Compensation Planning
- Preparation of Employment Manuals and Other Workplace Materials
- Commercial Litigation
- Employment Contract Enforcement/Negotiation
- Reductions in Force/Layoffs/WARN Act

**Education:**

- University of Miami School of Law (J.D.), 1990
- University of Florida (B.S.B.A. in Business Administration), 1980

**Bar and Court Admissions:**

- Florida

**Honors & Distinctions:**

- AV Rated by Martindale Hubbell
- Florida Bar Board Certified - Labor and Employment Law

**Professional Involvement:**

- Federal Bar Association
  - Board of Directors, 2007-2011
- American Bar Association, Labor and Employment section
- The Florida Bar, Labor and Employment section
- Hillsborough County Bar Association, Labor and Employment section
  - Co-Chair, 2007-2009
- Hillsborough Association for Women Lawyers
- Catholic Lawyer's Guild
- Hillsborough County Teen Court Judge
- Hillsborough County Guardian Ad Litem

**Community Involvement:**

- Lowry Park Zoo, Karamu Outreach Committee
- Crisis Center of Hillsborough County, Masquerade Ball Committee
- Tampa Connection, 1997
  - Board of Directors, 1997-1999



Florida Institute of Certified Public Accountants

# Employment Law Update

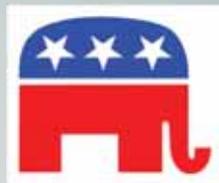
September 20, 2012



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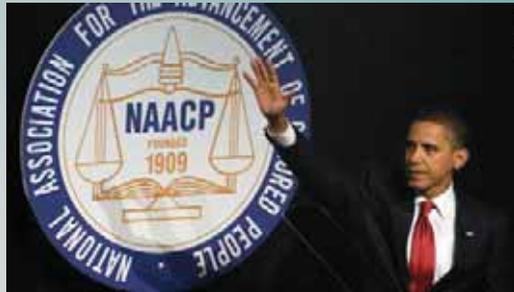
## POLITICAL BANTER

In any election year, discussions about the candidates and their platforms will be raised around the water cooler. What are the risks and remedies for employers?



- **Is Obama taking black vote for granted?**

- By **Shannon Travis**, CNN
- updated 5:37 AM EDT, Fri July 13, 2012



- President Obama speaks at the 100th NAACP convention in New York in 2009

Obama, Romney fight for women's vote

**SATURDAY, SEPTEMBER 8, 2012 LAST UPDATED: SUNDAY SEPTEMBER 9, 2012, 9:52 AM**

BY [JOHN REITMEYER](#) AND [MELISSA HAYES](#) - STATE HOUSE BUREAU, THE RECORD



Ann Romney declared, "I love you, women!" and praised the moms "who really hold this country together." First lady Michelle Obama said "mom-in-chief" was her most important title, but also went directly at issues like abortion rights and equal pay, saying "that's what my husband stands for."

## SPEAK UP (OR NOT)

Discussions on political views and/or opinions can lead to negative consequences.

- Discrimination or harassment claims
- Disrupt productivity
- Divide workplace

## EMPLOYER SOLUTIONS

- Anti-harassment policy
- Management training
- Clear reporting mechanism
- Prompt resolution

# Political Pit Falls

The Federal Election Campaign Act of 1971 (FECA) prohibits certain individuals and groups from making contributions to and or expenditures on candidates for federal offices. Prohibited activities include:



## FECA PROHIBITIONS

- Directing staff (who are not acting as volunteers) to plan, organize or carry out the fundraising project as a part of their work responsibilities using corporate or labor organization resources, unless the corporation or labor organization receives advance payment for the fair market value of such services;

## FECA PROHIBITIONS

- Soliciting contributions earmarked for a candidate that are to be collected and forwarded by the corporation's or labor organization's PAC, except to the extent such contributions also are treated as contributions to and by the PAC;

## FECA PROHIBITIONS

- Using coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal, or the threat of force, to urge any individual to make a contribution or engage in fundraising activity on behalf of a candidate or political committee.

## NLRB - NOT JUST FOR UNIONS

The National Labor Relations Act (NLRA) provides rights to both union and non-union employees.

## NO INTERFERING

- Employers are prohibited from interfering with, restraining, or coercing employees in the exercise of rights guaranteed under the NLRA. These include the right to engage in “concerted activities” for the purpose of organizing or to provide “other mutual aid and protection.” Policies restricting communication, can inadvertently violate these statutes.

## NO SECRETS ALLOWED

- Restricting employees' right to discuss wages and other terms of employment, discipline, performance evaluations, and termination data is unlawful.

## **SOCIAL MEDIA (FACE IT . . . THINGS ARE CHANGING)**

On May 30, 2012 the National Labor Relations Board issued a report discussing social media use policies.

## SOCIAL MEDIA EXAMPLES

- Face book
- Twitter
- LinkedIn
- Instagram

## EMPLOYER POLICIES

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law.
- Discussion of wages
- Working conditions

## CASE STUDY #1

Non-profit organization unlawfully discharged 5 employees after the employees posted negative comments on facebook concerning their working conditions, work load and staffing issues

Employer ordered to reinstate the 5 employees with back pay

## CASE STUDY #2

Employees engaged in a facebook discussion on taxes owed. 1 employee clicked the "like" option following another employee's statement of "I owe too. Such an asshole." The derogatory comment was describing the employer's accounting representative.

Face book discussion protected concerted activity.

## CASE STUDY #3

### “Use Technology Appropriately

- If you enjoy blogging or using online social networking sites such as facebook and Youtube, . . . Please note that there are guidelines to follow if you plan to mention [employer] or your employment with [employer] in these online vehicles. . .
- Don't release confidential guest, team member or company information. . .”

## NLRB Found Interference

- The NLRB found this section of an employee handbook to be unlawful. The instruction that employees not “release confidential guest, team member or company information” was deemed to prohibit employees from discussing and disclosing information regarding conditions of employment.

## TRIAL BY AMBUSH

### NLRB Procedures

- Charge
- Interview
- Sworn affidavits
- No discovery
- Hearing

## THE SLIPPERY SLOPE - BACKGROUND CHECKS

On April 25, 2012 the EEOC issued enforcement guidance regarding the use of arrest or conviction records when making employment decisions.

## BACKGROUND CHECKS - PROS

The reason for using criminal background checks:

- Combat theft and fraud
- Heightened concerns about work place violence
- Negligent hiring liability

## BACKGROUND CHECKS - CONS

Arrest and incarceration rates are particularly high for African American and Hispanic men. Assuming current incarceration rates:

- 1 in 17 white men will serve time in prison
- 1 in 6 Hispanic men
- 1 in 2 African American men

## Disparate Impact

- A covered employer is liable for violating Title VII when it is demonstrated that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.
- Record Keeping

## BALANCED WORK FORCE

An employer's evidence of a racially balanced work force will not be enough to disprove disparate impact.

## NO BRIGHT LINE RULES

- “We don’t hire criminals”
- A policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense
- Consistent application of policy

## INDIVIDUALIZED ASSESSMENT

Evidence an employer should review:

- Facts or circumstances surrounding the offense
- Number of convictions
- Age at time of conviction
- Age when released from prison
- Post-conviction work record

## The “Green Factors”

- The nature and gravity of the offense or conduct
- The time that has passed since the offense or conduct and/or completion of the sentence, and
- The nature of the job held or sought

## ARREST RECORDS

- *Per se* disparate impact
- Not job related or consistent with business necessity
- Pending charges versus older charges with no prosecution

## EMPLOYER DEFENSES

- Job related for the position in question
- Consistent with business necessity
- Compliance with federal laws and/or regulations
- Hiring in certain industries
  - Banking
  - Child care
  - Airport security

## JOB RELATED FOR THE POSITION

- The policy or practice “bear[s] a demonstrable relationship to successful performance of the jobs for which it was used” and “measures the person for the job and not the person in the abstract.”

## CONSISTENT WITH BUSINESS NECESSITY

- The terms of the exclusionary policy must “be shown to be necessary to safe and efficient job performance.”



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# ***CFO Update***

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*Raymond Monteleone, CPA*

# **Raymond C. Monteleone, CPA, MBA**

## **President**

### **Paladin Global Partners**

Ray Monteleone, a founding partner and president of Paladin Global Partners distinguishes himself not only by his professional career but his community involvement as well. Monteleone's depth of expertise spans multiple industries and business functions, successfully navigating the business world. Mr. Monteleone is also a partner with Dannelly, Monteleone & Associates, a full-service CPA firm.

With Paladin Global Partners, Mr. Monteleone provides innovative and unique solutions for a broad range of national and international clients representing an array of business interests. He focuses on services in the areas of strategic management, problem solving, mergers & acquisitions, compensation consulting, growing companies, and senior executive mentoring. Some of the industries he has served include healthcare, high tech, manufacturing, education, financial institutions and not-for-profit organizations. He has held numerous directorships in representative entities of those industries including Interactive Speech Solutions, Rexall Sundown, First American Railways, Durango & Silverton Narrow Gauge Railway, Rush Holdings, and Pointe Financial Corporation, and he currently chairs the Advisory Board of Algy Costumes.

Monteleone's reputation for professionalism and integrity led to a two-year appointment as Deputy Commissioner/Chief Operating Officer for the Florida Department of Education, appointed by Commissioner James Horne and recommended by Governor Jeb Bush. Prior to his stint with the Florida Department of Education, Monteleone served as chairman of the board and co-chief executive officer for Loren Industries Inc., a jewelry manufacturer, in Hollywood, Florida. Previously, Mr. Monteleone was president/COO & member of the board of directors of First American Railways; vice president of corporate development, planning & administration for Sensormatic Electronics Corporation; a consultant with Holland & Knight involved in strategic planning & practice development; and, a South Florida tax & business consulting partner with Arthur Young & Company, ascending to the level of Director of Taxes for all three South Florida offices.

Monteleone serves and has held leadership positions in multiple professional and civic organizations. He is the Past Chair of the Broward Education Foundation and is active with the Leadership Broward Foundation (Past President), National Society of Certified Healthcare Business Consultants, Leadership Florida (Advisory Board), Florida Atlantic University (FAU) Broward Seaside Burrow (Past Chairman), FAU National Alumni Association, FAU Broward President's Community Council, Florida Institute of Certified Public Accountants (Chair of the Industry Section Committee), and American Institute of Certified Public Accountants. He also served with AeA Florida (Past President), South Broward Hospital District Board of Commissioners, Enterprise Development Corporation of South Florida, Association for Corporate Growth Founder, State of Florida Continuing Care Advisory Board, Florida Chairman of the National Association of Manufacturers, Committee of 100, Hollywood Economic Development Board, and Chairman of the Child Care Connection, just to name a few. Ray was honored as a Leader of the Year by Leadership Broward, an Outstanding Broward Alumnus by Florida Atlantic University, and was recently inducted into FAU's Parliament of the Owls.

Monteleone graduated cum laude from New York Institute of Technology, attended graduate courses at North Carolina State and attended the Arthur Young Harvard Business School program. He received his MBA from Florida Atlantic University and has lectured at many universities and business & professional association seminars.

# CFO UPDATE



**PALADIN**  
GLOBAL PARTNERS

FICPA  
27<sup>th</sup> Annual Accounting Show  
September 20, 2012

# CFO ROLE



## SUCCESSFUL AND SUSTAINING LEADERSHIP

- You must be:
  - ✓ Essential (Needed)
  - ✓ Ethical (People Follow)
  - ✓ Exceptional Performance



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## SIX CORE BEHAVIORS OF SUSTAINING IMPACT

- Trusted
- Humility with accountability
- Courage / Learn from losing
- Find your major area of impact
- You engage and empower others (motivate)
- Relentless communicator



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# CFO ROLE

No matter the size of the company or organization in the private or public sector, the CFO is responsible for long-term, sustainable success!



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# Management Accounting



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Chartered Global Management Accountants Article: Management Accounting is More Than You Think – January 2012

## Role Change in the New Decade

- ❖ For Example, More Focus On...
  - Compensation & Benefits Management
  - Forecasting & Planning
    - Alternative Strategies
    - Concepts/ Quantifications



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## Role Change in the New Decade

- ❖ For Example, More Focus On...
  - More Written & Oral Communications
    - To Management
    - To Employees
  - Dashboards & Visibility
    - Monthly
    - Weekly / Daily



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## Role Change in the New Decade

### “Chess not Checkers”



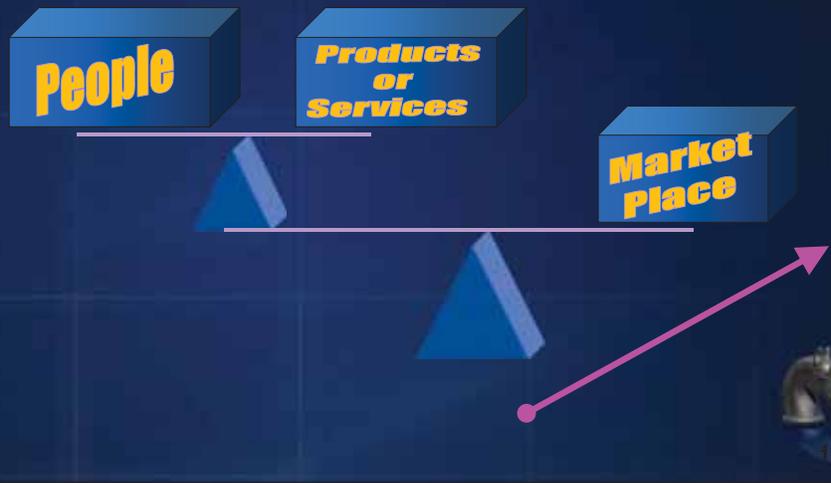
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## MISSION STATEMENT



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# THE FUTURE

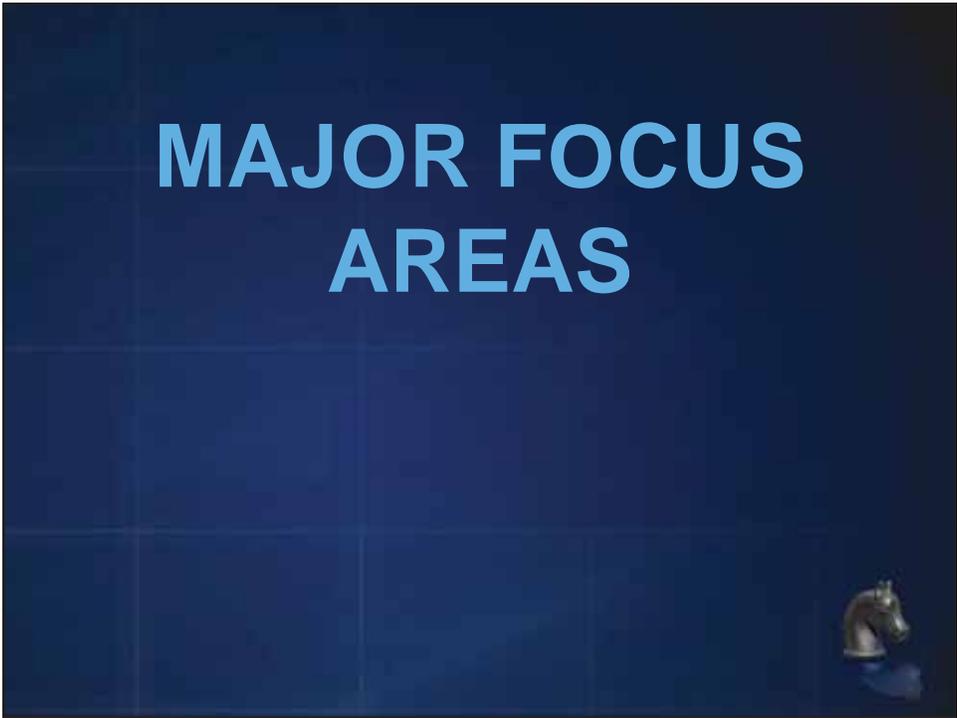


WE ARE INUNDATED WITH INFORMATION





WE FEEL AS IF WE WALK A  
DAILY TIGHTROPE



# MAJOR FOCUS AREAS



## Major Focus Areas

- Health Care Costs
  - Do we offer or not? [Obama Care]
  - Sharing cost with employees
  - Partial self-insurance
  - Improve Health Incentives



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## Major Focus Areas (Cont'd)

- Retirement Planning for Employees
  - Defined Benefit
    - Assumptions
      - Investments
      - Salary Levels
    - What is formula/RE: current back pay
  - Defined Contributions
    - P/S Plans
    - 401K →
      - Match
      - How Much
      - No Match



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## Major Focus Areas (Cont'd)

- Cash Flow
  - Budgeting Monthly
  - Constant Reforecasting (13 months?)
  - Set up like cash basis P&L
  - Debt
    - Availability
    - Covenants



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# FINANCIAL STATEMENT ANALYSIS



## Financial Statement Analysis

- Balance Sheet
  - Cash
  - Ratios
  - Comparison to last year
    - Monthly
    - Annual



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## Financial Statement Analysis (Cont'd)

- Balance Sheet Items
  - 1) Current liabilities to current assets
  - 2) Fixed assets to equity
  - 3) Cash to current liability
  - 4) A/R to A/P
  - 5) Debt to equity
    - S/T debt to equity
    - L/T debt to equity
  - 6) Contingent liability to equity
  - 7) Aging A/R excluding over 90 days compared to A/P
  - 8) Equity to intangible assets & goodwill



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## Financial Statement Analysis (Cont'd)

- Profit & Loss Statement – Comparisons & Ratios
  - Comparison to last year
  - Comparison to budget
  - % Goals forecasted vs. realized
  - Cost of materials/sales
  - Cost of goods/sales



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## Financial Statement Analysis (Cont'd)

- Sales & Marketing costs / sales
  - Labor (fully loaded)
  - Advertising
  - Public Relations
  - Selling Expenses
- Direct Labor
  - Manufacturing or warehouse
  - Facilities cost



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## Sample Profitable Company

Net Sales		100%
Cost Materials	30%	
Cost to Manufacture	20%	
Cost of Goods Sold		<u>(50%)</u>
Gross Margin		50%
Sales & Marketing Expense		(10%)
Facilities Cost		( 5%)
Other Labor (Fully Loaded)		(20%)
Other Costs		<u>( 5%)</u>
Net Margin		<u>10%</u>



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# ***Bankruptcy: A CPA's Client Perspective***

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*Susan Sharp*

**Susan Heath Sharp**  
**Partner**  
Stichter, Riedel, Blain & Prosser, P.A.

Ms. Sharp is a partner of Stichter Riedel Blain & Prosser, P.A. and has received her rating as an "AV" Preeminent Lawyer (highest rating) by Martindale-Hubbell Law Directory. She is listed as a Florida "Rising Star" in the area of bankruptcy/insolvency practice in "Florida Super Lawyers" 2011- 2012.

Ms. Sharp specializes in stay relief issues, creditor representations, Chapter 7 Trustee representations, Chapter 11 reorganization cases, and other bankruptcy related practice areas, representing scores of business and consumer debtors, and has successfully reorganized individuals and corporations in Chapter 11 cases.

Ms. Sharp obtained her J.D. from Stetson College of Law. Prior to law school, Ms. Sharp received her B.S. in Accounting from Indiana University and worked in Public Accounting as an Audit Manager with a national public accounting firm in Texas after passing the CPA exam in 1978.

Ms. Sharp is admitted to practice in all courts of the State of Florida, United States District Court for the Middle District of Florida, United States District Court for the Northern District of Florida, United States District Court for the Southern District of Florida, Eleventh Circuit Court of Appeals, and the Supreme Court of the United States.



## Bankruptcy Basics for CPAs

Susan Heath Sharp, Esq.  
Stichter, Riedel, Blain & Prosser, P.A.  
September 20, 2012

### Decisions...Decisions...Decisions???

- **To File or Not to File**
  - Type of Problem
  - Type of Debtor
  - Debtor's Objectives
  - Financial Structure
- **What to file**
  - Chapter 11
  - Alternatives to Chapter 11
- **When to file**



## Type of Problem

- One time catastrophic loss
- Excess capacity
- Regulatory issues
- Management issues
- Lender aggression
- Expense issues
- Rapid expansion
- Lawsuits
- Burdensome contracts

## Type of Debtor

- Corporation
- Partnership
- Limited Liability Company
- Small Business (secured and unsecured debt less than \$2,343,300)



## Benefits of Bankruptcy

- Sell assets free and clear
- Restructuring bank debt
- Automatic stay
- Avoidance powers
- Rejection of unfavorable contracts
- Possible tax advantages



## Automatic Stay

- Stay happens by Operation of Law
- Saves Time & Unnecessary Expense



## Bankruptcy Drawbacks

- Disruptive to operations
- Long time to implement
- Expensive
- Publicity
- Loss of management control



## Traditional Bankruptcy

- Debt restructure
- Expense reduction
- Breathing room
- Asset sales
- Orderly liquidation



## Dealing with the Major Players

- The debtor and the DIP
- Secured creditors
- Vendors
- Employees
- Committees
- The public
- The U.S. Trustee
- Government Entities
- Unions



## Prepackaged Bankruptcy

- Negotiated and accepted by creditors before filing bankruptcy
- Negotiated and accepted by most significant constituencies before filing bankruptcy
- Solicitation occurs after petition filed



# **Petition(s) & First-Day Motions & Orders**

## Filing Preparations

- Basic Information
  - Board Resolution
  - Petition
  - List of Creditors
  - List of Equity Security Holders
  - History of the Company (case management summary)

## Administrative Requirements of Chapter 11

- Filing schedules and statements
- § 341 meeting
- Monthly operating reports
- U. S. Trustee fees
- Initial Debtor Interview (IDI) documents
- Notices and claims administration
- Keeping track of deadlines

## Board Resolutions

- Required for a Voluntary Petition
- Authorize Officers of the Company to:
  - Sign Necessary Documents
  - Take Necessary Actions
  - Obtain Necessary Financing
  - Engage Professionals

## Schedules/ S.O.F.A

- Schedules of Debtor's Assets/ Statement of Financial Affairs
- Complex Chapter 11 Cases Require Extension  
30-45 Day Extension Typical (see Federal Rules of Bankruptcy Procedure, Rule 1007 (c))

## Information for Schedules and SOFA

- Proof of insurance
- Loan documents
- Copies of judgments
- Information regarding pending litigation
- Results of lien searches or judgment searches
- Copies of leases
- Copies of contracts

## First- Day Motions/Orders

- Administrative Motions/Orders
- Substantive Motions/Orders
  - Cash Collateral
    - Cash flow projections for next 90 days of operations
  - Prepetition wages
  - Pay officers' salary
    - Affiliates
  - Retention of Professionals
  - Utilities
- Additional Case-Specific Motions/Orders
- Comfort Motions/Orders

## Application for Employment of Professionals

- Code provides authority for trustee to employ "Attorneys, accountants, appraisers, auctioneers or other professionals that are *"disinterested persons"*"
  - Qualifications & Expertise
  - Services to be Provided
  - Disinterestedness
  - Indemnification
  - § 328 (improvident) or §330 (unreasonable)
- Types
  - Corporate Counsel
  - Restructuring Consultants
  - Public Relations Consultants
  - Conflicts Counsel
  - Special Counsel
  - Special Counsel (Case-Specific)
  - Tax Service Providers



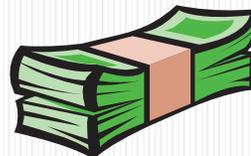
## Wages

- Employees will generally hold unsecured, priority claims
- Categorize parties and compensation to be paid
- Statutory cap per employee (\$11,725— 180 days)



## Cash Management/ Bank Accounts

- Chapter 11 Operating Guidelines
- Use existing check stock/ honor outstanding checks
- Disruption of Debtor's Business
  - Direct deposit collections



## Utilities

- §366(a) – 20 days
- Adequate assurance of payment in the form of a deposit or other security
- Court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment



## Critical Vendors

- Continuous service to customers
- Negotiating leverage
- Most vendors have competitors
- Debtors may be forced to demonstrate:
  - Indispensable nature of vendor's product
  - Form and manner of payment
  - The injury that will be caused to both debtor and vendor if the motion is denied

## Lease/Property Rejection/Abandonment

- Identify leases to reject/property to abandon
  - Earlier of 120 days after the order for relief or entry of order confirming a plan
- Establish rejection/abandonment procedures
- Rejection is retroactive to the petition date
- Must perform post-petition/pre-rejection
- May assign contract under certain circumstances
  - Must “cure” defaults



## Debtor-in-Possession Financing

- Continue Existing Credit Relationship
- Convert pre-petition financing to post-petition financing
- § 364
- Emergency Basis
- Budget



## What is DIP Financing

- The debtor receives a post-petition loan from DIP lender in exchange for liens and claims against the debtor's assets
- The purpose of DIP financing is to fund the debtor's operations during the Chapter 11 case
- DIP financing arrangements are often entered into even if the debtor can fund its operations through the use of "cash collateral"
- Provides vendors (and other constituencies) with comfort that the debtor has the means to operate

## Creditor and Reporting Issues

# Reporting During Reorganization

**Monthly Operating Reports**

**Budgets**

**Cash Flow Analysis**

**Pre-petition liabilities**

**Post-petition payments**



## Trade Creditor Issues

- Distinguish between pre-petition and post-petition invoices
- Ensure pre-petition claims are not paid
- Deal with vendor issues
  - Reclamation claims
  - Administrative claims for goods received within 20 days of filing
- Foreign vendors
- Maintaining trade credit

## Reporting to Creditors

- Borrowing base
- Cash collateral/DIP budget to actual
- Reports–post-petition operations
  - Sales
  - Margins
  - Cash/liquidity
  - Working capital (accounts receivable, inventory, accounts payable)
- Communication with Committees

## **Executory Contracts & Unexpired Leases**

## Overview

- NLRB v. Bildisco & Bildisco 465 U.S. 513, 523 104 S. Ct. 1188 (1984)
- Material Breach Test
- Assumption, Assignment, Rejection



## Assumption

- Reaffirmation
- Administrative / Priority Status
- Requirements:
  - Cure defaults
  - Compensation for Actual Pecuniary Loss
  - Adequate Assurance

## Assignment

- Must be Assumed First
- Debtor is relieved of all Prospective Liability
- Adequate Assurance of Assignee's Future Performance
  - Required regardless if there is an existing default
  - Assignee's General Financial Circumstances

## Rejection

- General Information
- § 365(g) – Rejection Treated as Prepetition Breach
- General Unsecured Claim
- § 503(b)(7) – Potential administrative claim if a lease is rejected post-assumption
- Non-residential real-property lease, the “rejected” landlord’s claim cannot exceed the greater of:
  - One year of rent; or
  - 15% of the remaining term of the lease, but not to exceed 3 years;



# Claims

## Claim Priority

- Administrative
- Secured
- Priority
- Unsecured, Non-Priority
- Subordinated claims
  - statutory
  - equitable

## Claims Process

- Debtor Schedules Claims
  - SCHEDULE D- CREDITORS HOLDING SECURED CLAIMS
  - SCHEDULE E- CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
  - SCHEDULE F – CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS
- Rule 2003. Fed. R. Bankr. P.
  - Chapter 11 – Creditor not required to file a POC
  - Creditor must only file POC if disputes scheduled claim
- Claims Bar Date
- Contingent, Unliquidated, Disputed Claims

## Claims Process

- Claims Reconciliation Process
- Omnibus Objection filed by Debtor
- New Rule that Governs Omnibus Objections
  - Notice of Hearing to all parties affected by Omnibus Objection
  - Identifies Claims Subject to Objection & Reason for Objection
  - Exhibits:
    - OMNIBUS 1: EXHIBIT A- AMENDED CLAIMS
    - OMNIBUS 1: EXHIBIT B- DUPLICATED CLAIMS
    - OMNIBUS 1: EXHIBIT C- LATE FILED

# ASSET SALES

## Asset Sales

### Sale of Assets in Bankruptcy Through a "363 Sale:"

The traditional method for buying and selling assets in bankruptcy has been through the confirmation of the plan. Under certain circumstances, this route may be more advantageous.

#### *Advantages:*

- Greater structuring flexibility in a §363 sale
- Asset sale generally free and clear of liens, claims and encumbrances
- §1146(a)

#### *Disadvantages:*

- Stringent confirmation process requirements
- Slower, more expensive

# Asset Sales

## Sale of Assets in Bankruptcy Through a Traditional Plan:

Enables purchasers to acquire assets, or entire enterprises, free of most liabilities without requiring purchasers to participate in the entire bankruptcy case.

### *Advantages:*

- Asset sale generally free and clear of liens, claims and encumbrances
- § 363 sale is faster, less expensive, and doesn't require vote of creditors



### *Disadvantages:*

- There is some dispute, and therefore risk to the purchaser, as to whether the court can order the transfer of assets free and clear of certain liabilities, e.g., environmental, product liability, employee claims
- *Sub rosa* plan argument
- Maybe lose transfer tax exemption
- Does not resolve the whole case

## Section 363 Sale Procedure

- Notice and opportunity for a hearing
- Order not required by Code, but parties usually want it
- Special concerns with sale of all assets
- Rule 2004
- Sale free and clear of liens - §363(f)

## Section 363 Sale Procedures

- Bidding procedures
- Break-up fees
- Other stalking-horse protections
- Strategy for stalking horse and competing bidder

## Court Approval of Section 363 Sale

- Satisfying the court
  - Adequate marketing
  - Adequate disclosure and notice
  - Arm's length, non-collusive
- The sale order: What will the court be willing to include?

# Plan of Reorganization and Disclosure Statement



## What's a Plan?

- A plan is an agreement between the debtor, its creditors and its equity holders that provides conditions for emergence from bankruptcy, including treatment of their respective claims and interests.
- Can also provide for a sponsored investment, a rights offering, or sale
- A contract freely negotiated (sometimes) but approved by court

## Develop the Plan Concept

- What is the goal of the plan?
  - Balance sheet restructuring
    - Debt restructure/conversion/refinance
    - Raise new capital
  - Income statement fix
    - Reject unprofitable contracts/leases
    - Rationalize employee benefit/retirement expenses
  - Address operational issues
    - Close locations

## What is the Disclosure Statement?

- The disclosure statement provides information about the debtor in sufficient detail to permit a hypothetical investor typical of the holder of a claim to make an informed judgment about the plan
  - history of the debtor
  - the reasons for filing
  - liquidation analysis
  - financial projections

## Cash Flow-The Core Issue

- The troubled company's cash flow is too small to service debt and pay existing, fixed obligations
- Bankruptcy cannot grow money!
- Can you make the revenues match the new debt service?



## Confirmation

- Vote
  - 2/3 in dollar amount of the allowed claims actually voting in such class; and
  - Greater than 1/2 in number voting in such class
- Cramdown



## Alternatives to Bankruptcy

- Out of Court Work Out
- Assignment of the Benefit of Creditors (ABC)
- Close the doors
  - Successor liability

## Out-of-Court Workout?

- Fewer transaction costs
- More private
- Quicker to implement
- Less disruptive to operations

## The Workout Meeting

- Be prepared with financials
- Honesty is the best policy
- Lenders' fatigue
- Reestablishing credibility
- One-time occurrences (bad winter) vs. patterns
- Forbearance agreements
- Engage professionals to sell assets
- Engage consultants to turn around operations



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