



# **CORPORATE COUNSEL & BANKRUPTCY IN THE PANDEMIC ERA & MORE**

**REAL COUNSELING FOR CORPORATE MANAGEMENT**

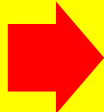
FOR ENTITY PROTECTION IN ANY AGE

--- but particularly in the Pandemic World ---

# PROGRAM FORESHADOWING

SHORT  
OVERVIEW

Extra Slides at  
The End



LANDMINES



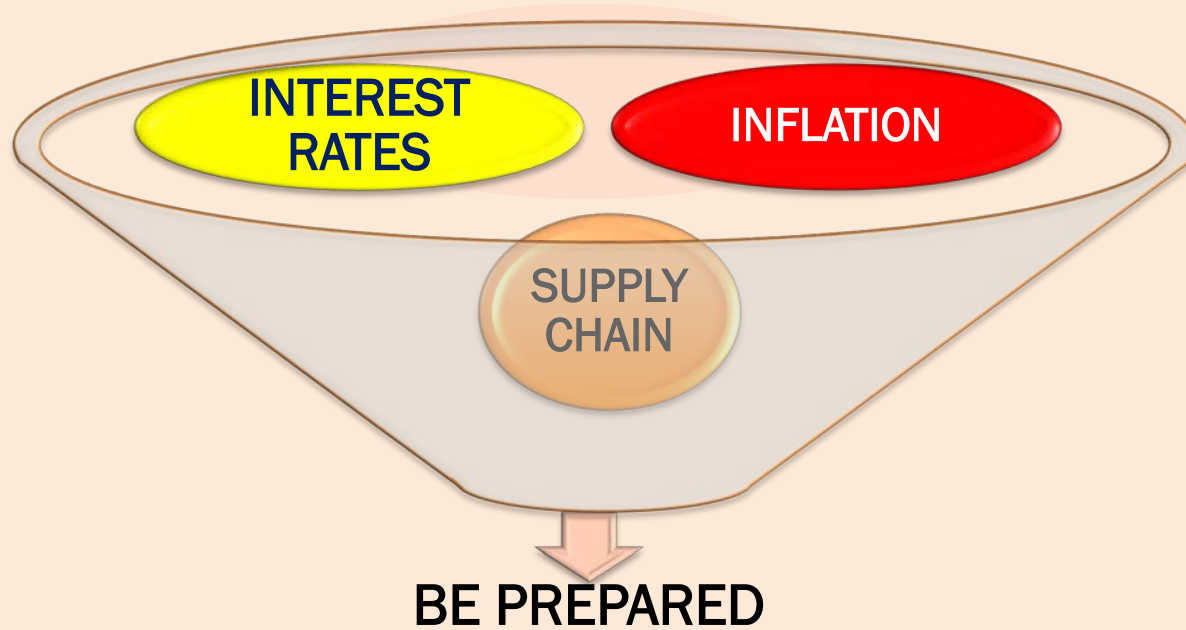
HINTS\*

\*Just not  
legal advice

# THE PANDEMIC & YOU



# DRINK TO THE 80'S



# Step 1: What Is My Company?



**Creditor**

**Debtor**

## STEP 2: UNDERSTANDING THE WHY

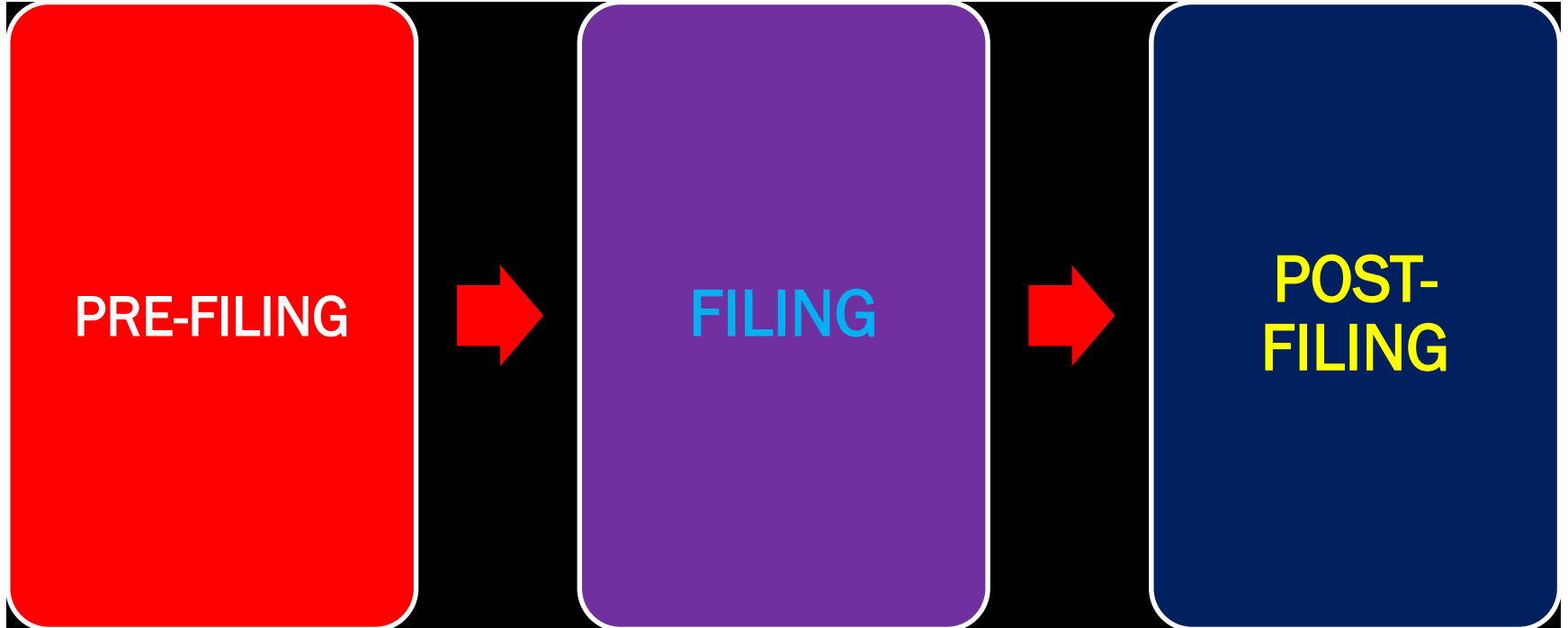
### Debtor's Rights

- Discharge
- Relief From Claims
- Restructuring Debt

### Creditor's Remedy

- Payment
- Prevention
- Protection

## STEP 3: TIME MATTERS



# THE LANDMINES

**PRE**

- Security: Be Secured
- Preferences: Collect

**FILE**

- Proofs of Claims
- Reclamation

**POST**

- Automatic Stay
- Cash Collateral
- Plan



# PRE-BANKRUPTCY CAUTIONS

PREFERENCES

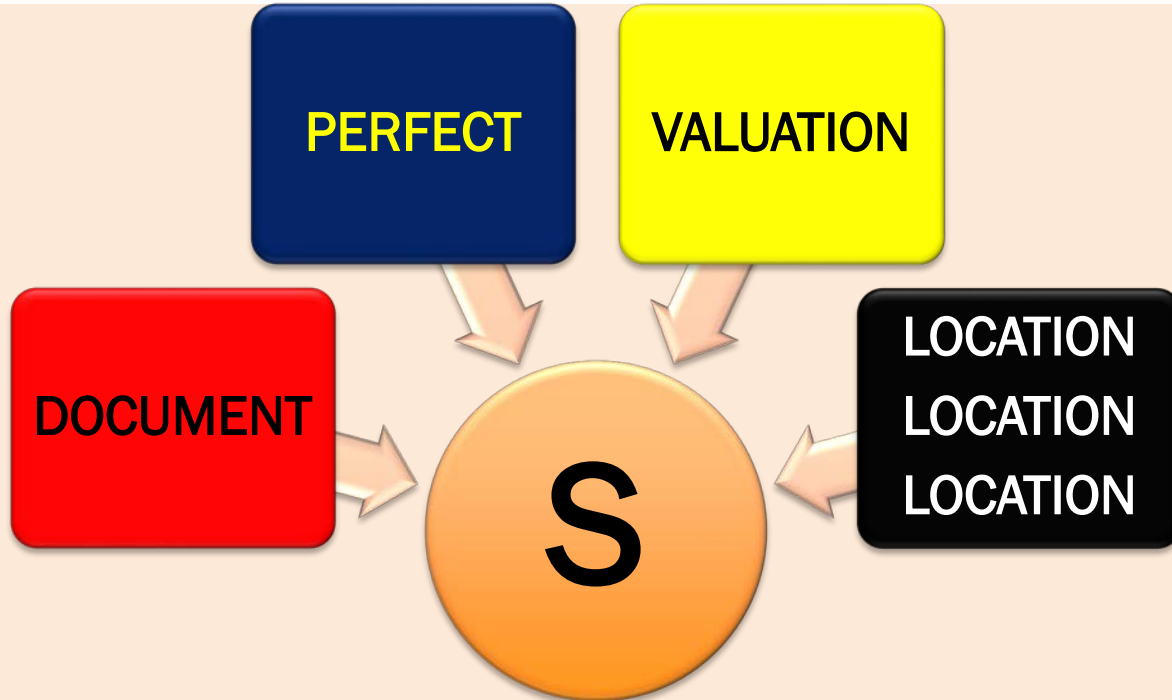
SECURITIZATION

§541

WORKOUTS

MONEY

# SECURITY HELPS



# UCC Article 9

- Attachment (or creation)
  - Value must be given
  - Debtor must have rights in the collateral
    - Different from consignment
  - Authenticated security agreement
    - Granting language: Debtor hereby grants to Secured Party a security interest in [insert description of collateral]
    - Authenticated: must be signed by Debtor

# UCC Article 9 (cont'd)

## – Perfection

- After a security interest has attached (or been created), the Secured Party must perfect its security interest
- For most types of collateral (including tangible inventory and equipment), perfection is accomplished by filing a UCC-1 financing statement with the Secretary of State in the state where the Debtor is formed (if the Debtor is a corporation, limited liability company or other entity).
- Once filed, the UCC-1 financing statement becomes a publicly available record. It tells the world that the Debtor has given a security interest to the Secured Party and it describes the affected collateral.

# UCC Article 9 (cont'd)

## – Priority

- Who wins when there are competing security interests in the same collateral?
  - First to file or perfect wins
  - Perfected security interest has priority over unperfected security interest
  - Perfection by control has priority over perfection by filing (perfection by control applies only to certain types of collateral)

# What is a Purchase Money Security Interest or “PMSI”?

- A particular type of security interest that gives the secured party priority over a conflicting security interest in the same goods.
- Only certain parties can have a PMSI. For purposes of this presentation, we will focus on (1) the seller of goods, and (2) the lender that finances the acquisition of goods
- A PMSI in “goods” (other than inventory or livestock) has priority over a conflicting security interest in those same goods if the PMSI is perfected when the Debtor receives possession of the collateral or within 20 days thereafter.
  - *The term “goods” is defined in the UCC to mean: “all things that are movable when a security interest attaches.”*

# What is a Purchase Money Security Interest or “PMSI”? (cont’d)

- A PMSI in inventory has priority over a competing security interest in inventory (as well as in proceeds of inventory) if:
  - *the PMSI is perfected when the Debtor receives possession of the inventory;*
  - *the PMSI secured party sends an authenticated notification to each holder of a conflicting security interest who filed a financing statement before the date of the PMSI filing;*
  - *the holders of conflicting security interests receive notification within 5 years before the Debtor gets possession of the inventory; and*
  - *the notification states that the sender has or expects to acquire a PMSI and describes the inventory.*

# How to Obtain a PMSI

- Identify the goods (e.g., inventory or equipment) that are the subject of the transaction.
- Obtain a security agreement, signed by the Debtor. The security agreement should adequately describe the collateral.
- Run a UCC search on the debtor to see if there are any conflicting security interests that have already been filed.



# How to Obtain a PMSI

- Prepare and file a UCC-1 financing statement
  - before shipping the goods to the Debtor, or
  - within 20 days after the Debtor receives the goods (only if the goods are not inventory of the Debtor)
- Prepare and send notices to holders of conflicting security interests if your PMSI covers inventory of the Debtor.

## How to Obtain a PMSI (cont'd)

- UCC-1 financing statements are effective for 5 years from the date of filing. If the Debtor's obligations to the Secured Party (which are secured by a PMSI) have not been fully satisfied within 5 years, then a UCC-3 continuation must be filed within 6 months before the initial financing statement expires.
- If the PMSI is in the Debtor's inventory, then a new notice must be sent to holders of conflicting security interests every 5 years.

# AVOIDANCE

Preference  
§547

Fraudulent  
Conveyance  
§548

Property of the  
ESTATE  
§541

# PREFERENCES SECTION 547 - - - Defenses Exist

- ❑ What is a preference? 11 USC §547
  - ❑ Judgments and attachment liens included
- ❑ What is antecedent debt?
- ❑ The preference periods 90 days/1 year
- ❑ Insiders & the preference periods

# IMPORTANT FOR YOU

- GET PAID ON TIME
- NEGOTIATE CHECKS WHEN RECEIVED
- DELAY IS COLLECTION DEATH
- FOLLOW CONTRACT PROCEDURES

# FRAUDULENT CONVEYANCES

- **Uniform Voidable Transactions Act**
  - **CCP §3439.04**
  - **Mejia v. Reed (2003) 31 Cal. App.4th 657**
- **Fraudulent Conveyance Tort Claims**
- **Fraudulent Conveyance BK Claims §548**
- **Fiduciary Duties & Common Law**

# DISCUSSIONS TO AVOID

**INTENT**

- HINDER
- DELAY
- DEFRAUD

**EFFECT**

- Less Than Fair Consideration
- Left Insolvent
- Left w/ Inad Cap.

**INSIDERS**

- SUBS
- GUAR.

# THE FILING DATE



PRE

POST



# DECISIONS—DECISIONS

**PROOF OF CLAIM**

**AUTOMATIC STAY**

**THE FILING**

**CASH COLLATERAL**

**RECLAMATION**

## SECTION 362 THE AUTOMATIC STAY

- **BAD THINGS HAPPEN TO PEOPLE WHO VIOLATE THE AUTOMATIC STAY “WILLFULLY”**
- **actual damages, punitive damages, attorney’s fees and costs.**

# PROOF OF CLAIM

## BAR DATES MATTER

ASK FOR THEM

ON THE DOCKET



## SCHEDULES & STATEMENTS

LOOK FOR THEM

SPECIAL NOTICE



## THE CREDITORS DILEMMA

GET PAID

AMBUSH JURISDICTION

## **Seller Reclamation Claims When a Buyer of Goods Files Bankruptcy**

- **Seller** is a manufacturer and/or supplier of goods who sold on credit a total of \$100,000 of goods to **Buyer/Debtor** in the ordinary course of Buyer/Debtor's business, with \$50,000 of the goods actually received by the Buyer/Debtor within 45 days, and the other \$50,000 actually received by the Buyer/Debtor within 20 days of the Buyer/Debtor filing a chapter 11 bankruptcy.

# Reclamation Claims of the Seller of Goods

- **What:** The right of a Seller to reclaim goods and/or the value of goods sold on credit to, and received by the Buyer/Debtor in the ordinary course of business, shortly before the Debtor/Buyer files bankruptcy. Specifically: (i) the return of the goods received by the Buyer/Debtor within 45 before the bankruptcy filing, and (ii) the value of those goods received within 20 days before the bankruptcy filing.
- **Why:** To remedy a potential injustice to the Seller of goods who in good faith continues to sell goods on credit at the request and urging of the Buyer, who then files bankruptcy shortly thereafter. Stated another way, to promote the continuation of the Buyer's business while protecting and not penalizing the good faith Seller who continues to sell goods to the Buyer on credit.

# RECLAMATION DEMANDS

**How:** Seller must initially make a written demand (“**Reclamation Demand**”) requesting: (i) the immediate return of the specific goods identified by SKU, serial number or description received by the Buyer/Debtor within 45 before the bankruptcy filing, (ii) that all such goods be segregated and preserved by the Buyer/Debtor for the benefit of the Seller pending their return; and (iii) the payment of the value of those particular goods received within 20 days before the bankruptcy filing.

**When:** The Reclamation Demand must be made by the Seller within 20 days after the bankruptcy filing, or within 45 days of the Buyer/Debtor’s actual receipt of the goods, whichever occurs later. Whether the Buyer/Debtor responds to the Reclamation Demand, and returns the goods received within 45 days, and/or pays the \$50,000 value of the goods received within 20 days, may require the Seller to take further action in the bankruptcy, and will further depend upon the success of the bankruptcy.

## **Request for Payment of 20-Day Administrative Claim:**

- The Seller of goods should immediately file a claim in the Buyer/Debtor's bankruptcy for payment of the \$50,000 value of goods received by the Buyer/Debtor within 20 days prior the bankruptcy filing ("**Section 503(b)(9) Administrative Claim**").
- The Section 509(b)(9) Administrative Claim may not be paid immediately, but is entitled to administrative priority treatment – similar to claims based on the sale of goods and services provided to the Buyer/Debtor after the bankruptcy filing - subject to competing claims of secured creditors who have a security interest in the same goods (i.e., inventory), unless the Seller also has a duly perfected PMSI in the goods.
- Although there is no deadline to file a Section 509(b)(9) Administrative Claim under the bankruptcy code, a deadline may be set by local bankruptcy court rules, or the bankruptcy court upon application by the Buyer/Debtor to set a bar date to file other general unsecured claims.

# Potential Bankruptcy Adversary Proceeding and Need to File Proof of Claim:

- **Complaint for Turnover of Goods:** If the Buyer/Debtor refuses to return the goods based upon the Reclamation Demand, the Seller may be required to file an “adversary proceeding” against the Buyer/Debtor in the bankruptcy to enforce its reclamation rights as to the specific goods.
- **General Unsecured Proof of Claim:** Seller should also file a Proof of Claim in the Buyer/Debtor’s bankruptcy for the entire \$100,000 due and unpaid, prior to any deadline established by the bankruptcy court, which if not objected will be allowed and received and therefore entitle the Seller to share in any distribution under the Buyer/Debtor’s chapter 11 bankruptcy plan.



# Post-Filing Operation Issues

## CODE SECTION 365 - - - LEASES

Assumption

Rejection



## CODE SECTION 364 - - - BORROWING

Priority

Priming



## CODE SECTION 363 - - - USE, SALE

Ordinary Course

Adequate Protection

# SECTION 365 ISSUES

**Assumption**

**Cure**

**Adequate  
Assurance**

**Rejection**

**Claim**

**Bifurcated  
Amounts**

# THE SMALL BUSINESS CH 11

- February 2020
- Designed to Make Chapter 11 Easier & Cheaper
- Under \$7.5 Million in Total, Non-Contingent, Secured & Unsecured Debt

--- BUT ---

# WHY IT EXISTS?

Chapter 11 WAS TOO COSTLY

Chapter 11 WAS TOO HARD

Chapter 11 WAS TOO COMPLEX

# HOW IT HELPS

- **1191(b) - - - Acceptance by Secured/Unsecured Creditors Not Required**
- **1191(c) - - - Payments 3-5 Year Term**
- **1195 - - - Owed < \$10,000 Existing Firm Can Represent**
- **NO US TRUSTEE FEES 28 §1930(a)(6a)**

# WHAT IT DOES

- **1183 - - - Standing Trustee Requirement**
- **1102(a)(3) - - - No Creditor's Committees**
- **1188 - - - Status Conference in 60 Days**
- **1181(b) - - - Exclusive Right to File Plan within 90 Days**

# NOW

- **March 2022 — The Sub Chapter 5 Limits Will Extend or Not**
- **Inflation and Interest Rates are a Big Future Bankruptcy Concern**
- **PPP—BBB—Congressional Mid-Term Elections Issues - - - Non-Debtor Discharges**

# CONTACT INFORMATION

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# WHY: SOME THINGS THAT MIGHT HELP

- HOLD DOWN COSTS
- MANAGE OUTSIDE COUNSEL
- UNDERSTAND OR
- JUST BECOME FAMILIAR AS YOU GO

# Very Basic Bankruptcy Terms

## TERMINOLOGY

- The “Code” ▶▶▶ Title 11 United States Code Section 101, *et seq.*
- The “Act” ▶▶▶ The 1898 Bankruptcy Act—Through September 30, 1979
- The “Debtor” ▶▶▶ One who OWES Money
- The “Creditor” ▶▶▶ One who is OWED Money

# What: The Constitutional Basis

## UNITED STATES CONSTITUTION

### ARTICLE I Section 8 - Powers of Congress

- The Congress shall have Power . . .
- To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States; . . . .

# What: The Statutory Basis

- Title 11 United States Code §101, et seq.
- Known as the Bankruptcy Code
- Each Case Is a Universe and Inside Each Case are Several:
  - Galaxies - - - Adversary Proceedings (Lawsuits)
  - Solar Systems - - -Contested Matters (Motions)
  - Planetary Bodies - - - Procedural Matters

# A JUDICIAL PROCESS

## COURTS

- Bankruptcy Courts are “Article I” Courts
- United States District Courts are “Article III” Courts.
- **JURISDICTION MATTERS!!!**
  - **FEDERAL SYSTEM—Federal Courts are Courts of LIMITED JURISDICTION**
  - **ALWAYS START with Jurisdiction**

# UNDERSTAND THE SYSTEM

- **Jurisdiction REALLY Matters**
- **The Law That Applies May Govern the Outcome**
- **Results are NOT Predictable**

# Bankruptcy Courts Are Article I

- Bankruptcy Judges Are Not Appointed By The President
- Bankruptcy Judges Do Not Have Lifetime Tenure
- Bankruptcy Judges Salaries CAN Be Reduced During Their Term in Office

# Bankruptcy Jurisdiction

## ARTICLE III

### Section 1 - Judicial powers

- **The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.**



# COURTS OF LAW & EQUITY

- The LAW Is The Statutory Scheme Created By Congress
- The EQUITIES Concern Adjusting Relationships Among Parties
- MULTIPLE/PARALLEL LITIGATION IS THE NORM

## NAMING & KNOWING THE TYPICAL ACTIONS:

- The CASE
- The Adversary Proceeding
- The Contested Matter
- The Motion

# THE SPATIAL METAPHOR

## ◆◆ The differences among a bankruptcy:

- [1] “case” ▶▶ The UNIVERSE
- [2] “adversary proceeding” ▶▶ Galaxy
- [3] “contested matter” ▶▶ Solar System
- [4] “motion” ▶▶ Planet

# HOW: THE APPROACH TO TAKE

- **START WITH WHAT YOU NEED TO ACCOMPLISH**
- **VIEW FROM THE END - - - DON'T BITE YOURSELF LONG TERM TO SUCCEED SHORT TERM**

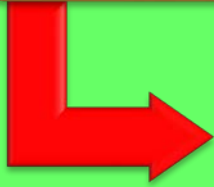
# HOW: LAWYERS HANDLE BANKRUPTCY ISSUES

- Always Know the REASON For The RULE
- Always Know the REASON WHY the RULE Applies
- See the BIG PICTURE FIRST
- Don't Bite Your Own Behind
- See the BIG PICTURE LAST

# HOW: THE METHOD

**KNOW**

- Know what you want to accomplish



**CODE**

- Read the Code Sections that apply

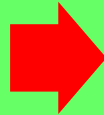


**RULES**

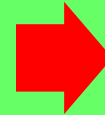
- Read & USE

# COUNSELING: THE IMPORTANT THINGS

Know The  
Numbers



Anticipate  
Future  
Needs



Prepare  
Contingenc  
yPlans

# RESOLVING CONFLICTS

## THE LAW

State Law Creates Rights

Rights Create Property Interests



## THE REASON IT MATTERS

Property Has Value

But Rights Have Limits

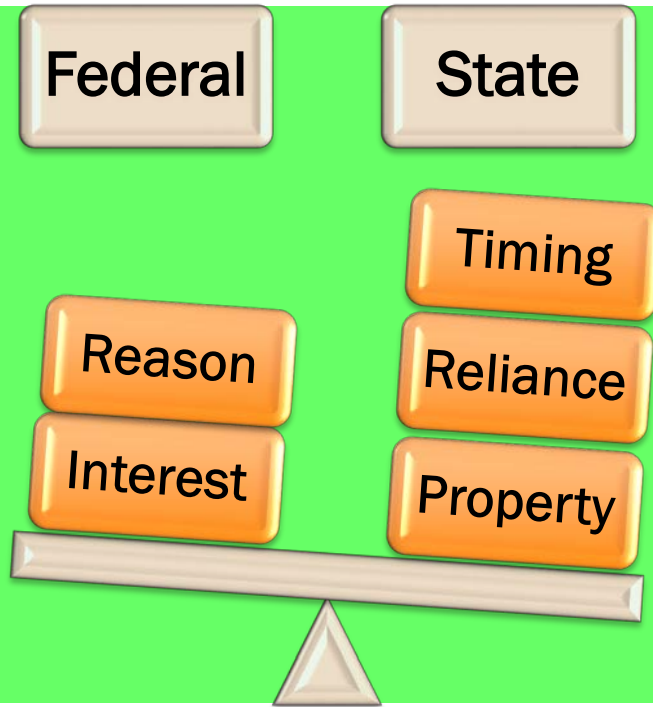


## THE REMEDIES

Cannot Ignore State Law

Cannot Ignore Federal Interests

# BUTNER v. U.S., 440 U.S. 48 (1979) — CHOOSING THE LAW





# State Law Determines Rights

- “The Bankruptcy Act does include provisions invalidating certain security interests as fraudulent, or as improper preferences over general creditors. Apart from these provisions, however, Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.”
- “**Property interests are created and defined by state law.** Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”

# THE LIKELY PROCEDURES

- **Expect the Unexpected**
- **HOW Your Company's Issues Likely Will be Dealt With in the Vast Majority of Interactions With the Bankruptcy System**

# THE PROCEDURE YOU SEE



# THE PROCEDURE YOU NEED—NOTICE

**WHO**

- Anyone Affected
- Everyone Required

**WHAT**

- What you seek
- When you seek it
- When they must respond

**WHEN**

- Rule
- Rote
- How

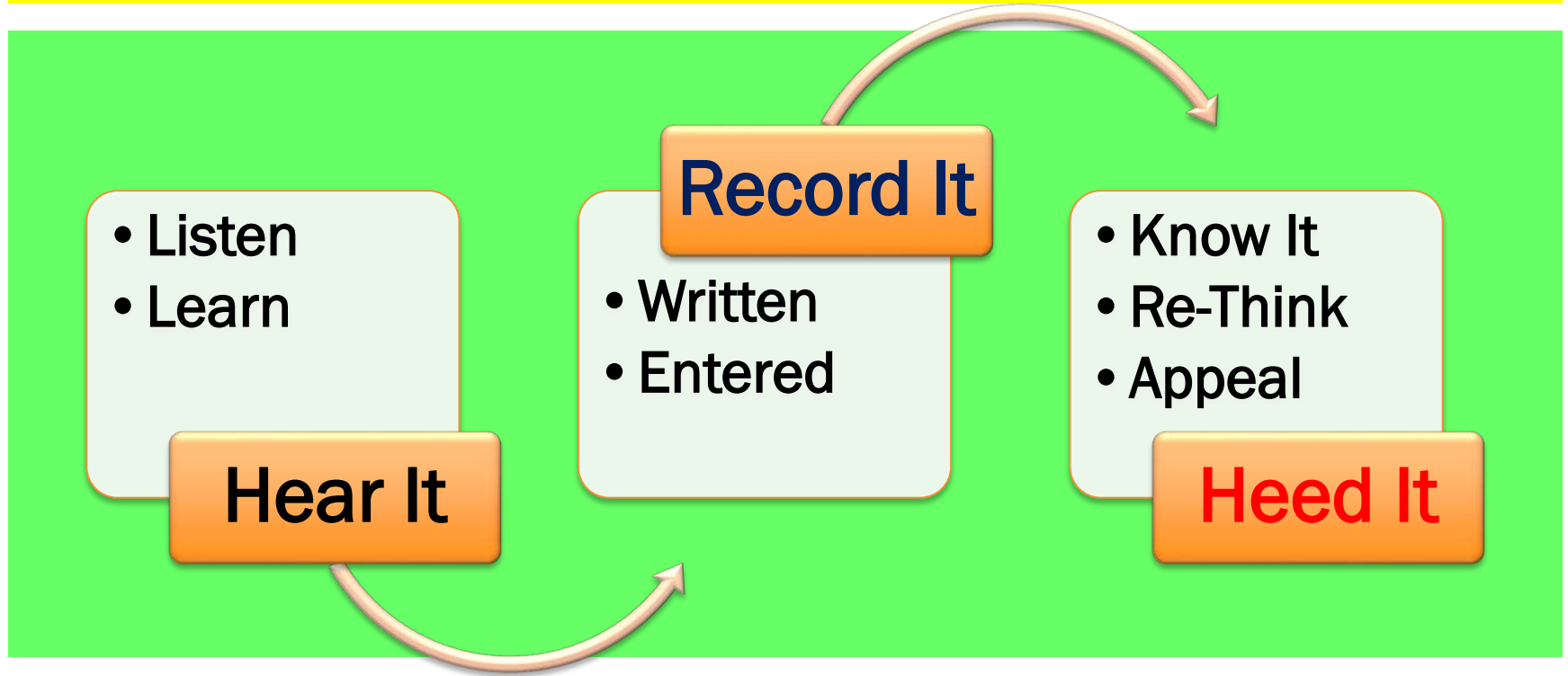
# HEARING

**Evidence**

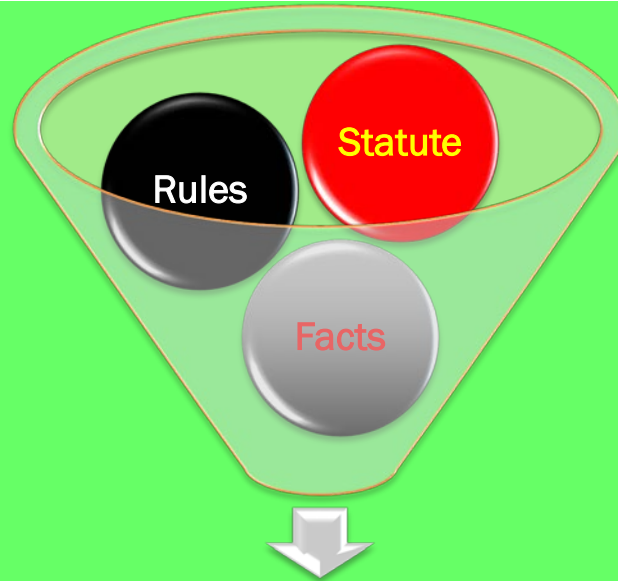
**Argument**

**Entitlement**

# RULING



# The Mechanics Always Matter



**BE ETHICAL = Success**

# THE RESOURCES

## Code

- §102
- §362(e)
- READ

## Rules

- INDEX
- FORMS
- NOTICE

## Court

- DISTRICT
- BK
- DEP'T



# HOW TO FIND THINGS

## Motions

- BR 9013
- BR 2002
  
- BR 4001
- BR 9019

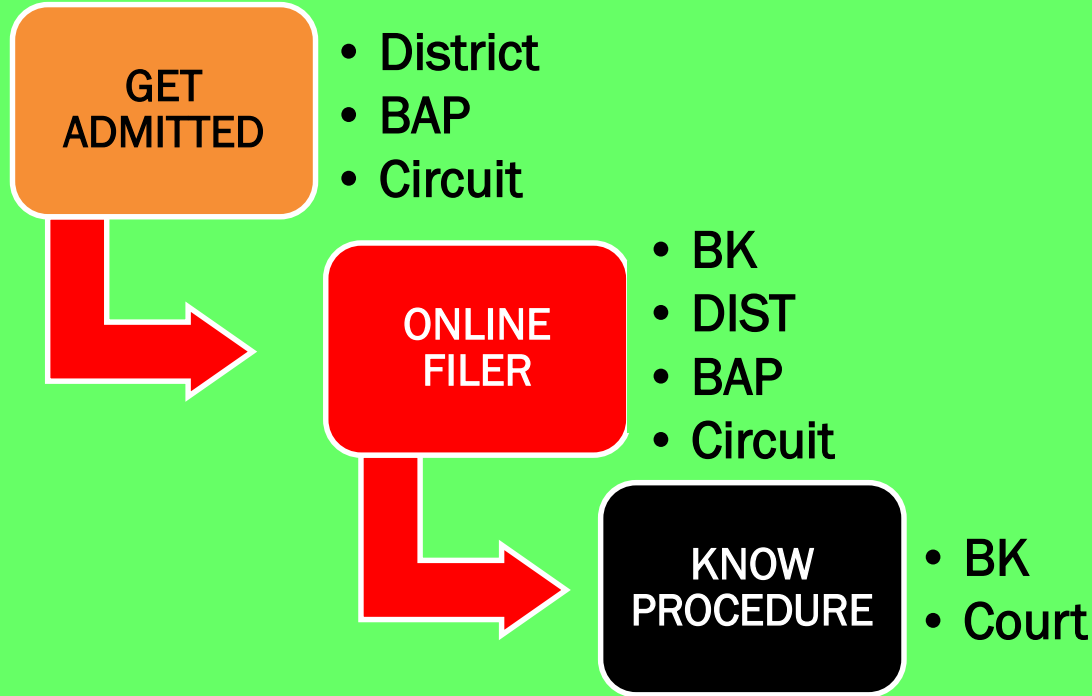
## Contested Matters

- BR 9014
- BR 9006
  
- PLAN
- DISCLOSURE

## Adversary Proceedings

- BR 7001
- BR 7004
  
- LAWSUITS
- INJUNCTIONS

# THE LAWYER YOU NEED MUST HAVE ACCESS



# HOW YOUR LAWYER WORKS

## Papers

- What to File- FORMS, PROCESS, NOTICE, EVIDENCE
- Where to File- ONLINE FILING IS A MUST
- When to File-WHEN YOU MUST, WHEN YOU SHOULD

## Persons

- Who to Serve
- When to Serve
- What to Serve

## Process

- Doing it Right
- Doing it Completely
- Doing it Timely

# FORMS

USE THEM

MANDATORY

BE PRECISE

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