



Chapter 4

Cite as 17 *E. Min. L. Inst.* ch. 4 (1997)

Transacting Business with Bankruptcy Debtors and Trustees

Ellen S. Cappellanti
Eric L. Burk
Jackson & Kelly
Charleston, West Virginia

Synopsis

§ 4.01.	Introduction.	108
§ 4.02	Transacting Business and Avoiding Transfers Under 11 U.S.C. § 549.	109
§ 4.03.	Post-Petition Extensions of Credit Under 11 U.S.C. § 364.	109
	[1] — Unsecured Loans in the Ordinary Course of Business.	110
	[2] — Unsecured Loans Not in the Ordinary Course of Business.	112
	[3] — Secured Loans.	112
	[a] — Superpriority Liens.	112
	[b] — Cross-Collateralization.	113
§ 4.04.	Purchase and Sale of Assets Under 11 U.S.C. § 363.	115
	[1] — Sale of Assets in the Ordinary Course of Business. .	115
	[2] — Sale of Assets Other than in the Ordinary Course of Business.	115
	[3] — Sale “Free and Clear” of Interests.	117
	[a] — Sales Price in Excess of All Liens.	117
	[b] — Money Satisfaction of an Interest.	118
	[c] — Tax and Judgment Liens.	118
	[4] — Good Faith Buyer Provision.	119
	[5] — Other Buyer Protection Devices.	119
	[6] — Successor Liability Claims.	120
	[a] — Successor Liability Generally.	120
	[b] — Successor Liability with Respect to Future or Unknown Claimants.	121
	[c] — Successor Liability Under the Coal Industry Retiree Health Benefits Act of 1992.	122
	[i] — The First <i>Lady H</i> Decision.	122
	[ii] — The Second <i>Lady H</i> Decision.	123
	[iii] — The <i>Leckie</i> Decision.	124
	[d] — Successor Liability Under Article I of the National Bituminous Coal Wage Agreement.	126

§ 4.05. **Assignment of Leases and Executory Contracts**
 Under 11 U.S.C. § 365. 127
 [1] — Leases or Interests in Land. 128
 [2] — Non-Assignment Provisions Not Enforceable. 128

§ 4.06. **Conclusions.**..... 129

§ 4.01. Introduction.

Lucrative business opportunities are available for those willing to transact business with bankruptcy debtors and trustees.¹ The advantage in transacting business with bankruptcy debtors and trustees include: (1) premium interest rates to reflect the risk inherent in loaning funds to a debtor or trustee can be negotiated; (2) parties buying assets from debtors or trustees can often obtain discounted prices; (3) assets sold through bankruptcy court-approved sales often can be cleansed of liabilities far more easily than dispositions under non-bankruptcy law; and (4) leases or contracts which contain terms prohibiting assignment can be assigned in a bankruptcy proceeding notwithstanding such prohibitions. However, unless the requirements and procedures of the Bankruptcy Code governing such transactions are satisfied, what was potentially a lucrative business opportunity can become a financial disaster.

This chapter deals with the basic mechanics of transacting business with a bankruptcy debtor-in-possession or trustee and some of the issues which commonly arise. First, this chapter addresses procedures for making loans or extending credit to a bankruptcy debtor. Next, this chapter examines how a bankruptcy debtor can sell assets and, particularly, whether those assets can be sold free and clear of claims and interests such as successor liability. Finally, this chapter addresses the assignment of unexpired leases and executory contracts in a bankruptcy proceeding.

¹ These opportunities most commonly arise in Chapter 11 reorganization cases. In a Chapter 11 case, the debtor, or in a corporate or partnership case, the debtor’s officers, directors or partners continue to manage the debtor’s business. A trustee is not appointed unless there has been fraud, dishonesty, incompetence, gross mismanagement or if appointment of a trustee is in the best interests of creditors. 11 U.S.C. § 1104. In Chapter 7 cases, a trustee is appointed to administer and liquidate assets. Occasionally, the trustee is authorized to operate the debtor’s business in a Chapter 7 case. In those situations, the Chapter 7 trustee also may need to borrow funds such as in the *Snowshoe Co.* case discussed below.