

Table of Contents

- I. Introduction 1**
- II. Why Businesses Fail 5**
 - A. Three Main Reasons for Business Failure 6
 - 1. *Bad Management*..... 6
 - 2. *Bad Decisions* 6
 - 3. *Bad Economy*..... 6
 - B. The Warning Signs 7
 - 1. *Accounts Receivable Aging* 7
 - 2. *Increasing Leverage*..... 7
 - 3. *Management Turnover* 7
 - 4. *Defective Management* 8
 - 5. *Lagging Innovation and Loss of Market Share* 8
- III. Fair Debt Collection Practices Act (FDCPA).. 9**
 - A. Which Debts Are Covered?..... 11
 - B. Who Is Covered? 11
 - C. Affirmative Disclosure Obligations 12
 - D. Prohibited Practices 13
 - E. FDCPA Enforcement 15
 - F. Damages Available 16
- IV. Fair Credit Reporting Act (FCRA)..... 17**

A. Scope of Application	18
B. Regulated Entities.....	19
1. <i>Furnishers</i>	19
2. <i>CRAs</i>	19
3. <i>Users of Information</i>	20
C. FCRA Enforcement.....	21
V. Consumer Financial Protection Bureau (CFPB).....	23
A. The CFPB’s Powers.....	25
B. The Examination Process	26
C. Trends in CFPB Enforcement	27
D. Nuts and Bolts of Enforcement Actions	29
VI. Credit Reporting.....	33
A. D&B Hoover’s.....	36
B. Moody’s.....	36
C. Google and Social Media	37
D. Asset Searches	37
E. UCC Searches	38
VII. Contract Protection.....	39
A. Payment in Advance/Cash on Delivery.....	40
B. Letters of Credit.....	41
C. Guaranties.....	42

D. Title43
E. Springing Security Interest44
F. (Not) Property of the Estate.....44
G. *Ipsa Facto* Clauses/Automatic Termination45
H. Waiver of Stay46

VIII. Pre-Litigation Strategy49

A. Creating Procedures and Evaluating the Loan50
B. Pre-Negotiation Letters51
C. Opening Dialogue with the Debtor52
D. Methods for Securing Payment53
E. Negotiated Settlements53
F. Promissory Notes53
G. Personal Guarantees54
H. Confessions of Judgment.....54
I. Pre-Complaint Discovery56

IX. Litigation59

A. Procedure60
 1. *Rules of Civil Procedure*.....60
 2. *Litigation Process*61
 3. *Duration of Litigation*.....63
B. Common Legal Claims64
C. Piercing the Corporate Veil.....65

D. Successor Liability67
 E. Involuntary Bankruptcy69
 F. Enforcement of Judgments70

X. Automatic Stay and Preference Actions ...75

A. Automatic Stay.....76
 B. Preference79
 C. Definitions and Meanings of Terms.....80
 D. Exceptions to Preferential Transfers: § 547(c)83
 1. Contemporaneous Exchanges for New Value.....83
 2. Payment in the Ordinary Course of Business83
 E. Security Interest in Inventory or Receivables
 (“Improvement in Position Test”): § 547(c)(5).....86
 1. Section 547(c)(5)(A)86
 2. Section 547(c)(5)(B).....87
 3. Statutory Liens: § 547(c)(6).....87
 F. Fraudulent Transfers.....88
 1. Actual Fraud: § 548(a)(1)(A)89
 2. Constructive Fraud: § 548(a)(1)(B).....91
 3. Relevant Time Periods93
 4. Subsequent Transferees: § 550(a).....93
 5. Defenses93
 G. Unauthorized Post-Petition Transfer94

XI. Bankruptcy97

A. Chapter 7	98
B. Chapter 11	100
1. <i>Business Reorganization</i>	100
2. <i>Chapter 11 Liquidation</i>	104
3. <i>Pre-Packaged vs. Pre-Negotiated Plans and Restructuring Support Agreements</i>	107
C. Chapter 13	110
D. Foreign Proceedings	113
E. Operational and Financial Information/ Schedules and Statements	115
F. First-Day Pleadings and Affidavits.....	118
G. Cash Collateral and Debtor-in-Possession Financing.....	121
H. Proofs of Claim	125
1. <i>General Unsecured Claims</i>	125
2. <i>Section 503(b)(9) Claims</i>	127
3. <i>Reclamation Claims</i>	129
4. <i>Administrative Claims</i>	130
I. Official Committee of Unsecured Creditors.....	131
J. Operating Reports.....	134
1. <i>Initial Operating Report</i>	134
2. <i>Monthly Operating Reports</i>	134
3. <i>Post-Confirmation Reporting</i>	136
K. Section 341 Meeting of Creditors.....	137

XII. Nonbankruptcy Alternatives 139

- A. UCC Article 9 Sale 140
- B. Assignment for the Benefit of Creditors 141
- C. Receivership..... 142
- D. Out-of-Court Wind-Down/Composition 144

XIII. Conclusion 147

