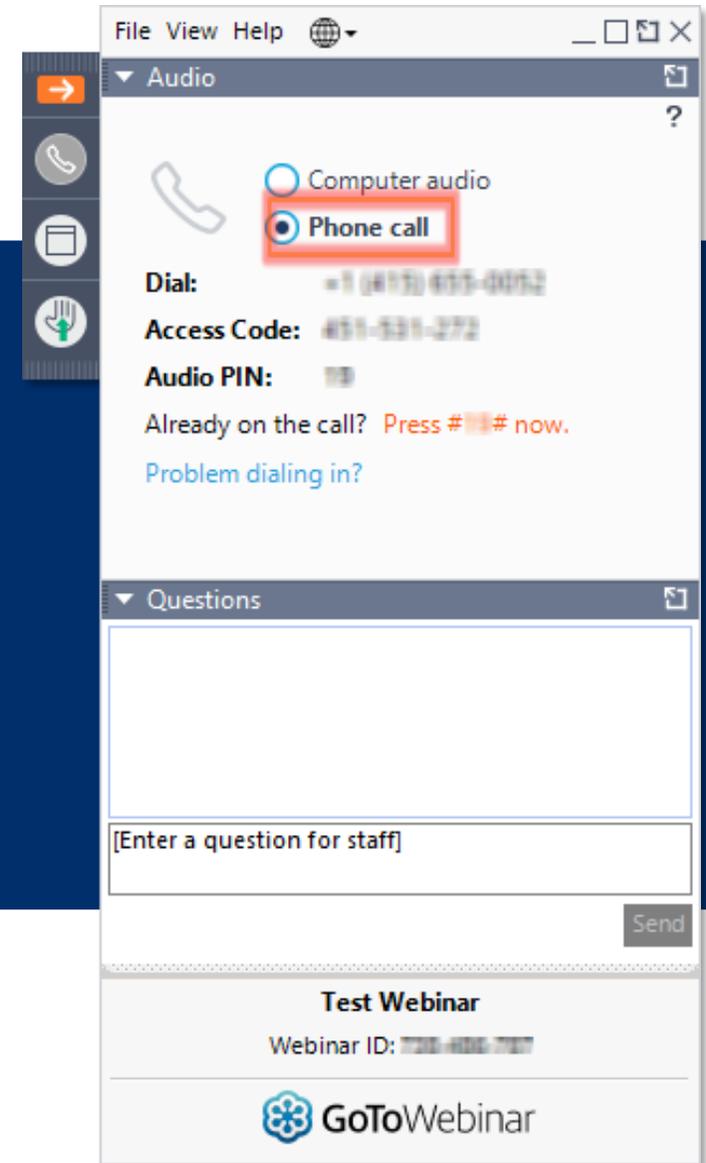




LIVE Webinar:
**Successfully Navigating Customer and Supplier
Bankruptcies During COVID-19**

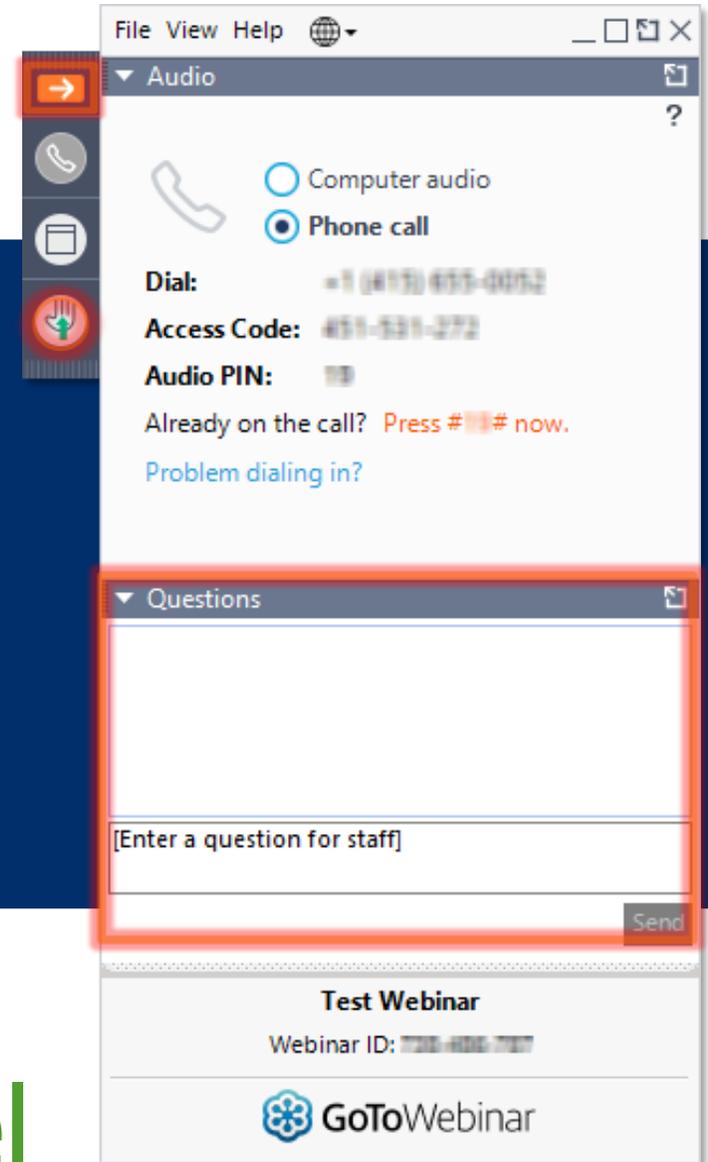
Wednesday,
October 28, 2020
12:00 p.m. EST

- Select "Computer audio" to join via VOIP
- Select "Phone call" to dial in



Audio Instructions

- Grab Tab
- Handouts
- Questions



Attendee Control Panel

Objectives

On this webinar we will discuss:

- What every business leader should know about solvency issues with customers or suppliers
- Important considerations regarding small business bankruptcies
- How do bankruptcy issues impact your contracts



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Meet the Speakers

Solvency Issues with Customers or Suppliers



Managing Credit Risk Related to Your Customers

- Avoid Credit Transactions
 - Cash on Delivery
 - Cash in Advance
- Keep Payment Terms “Ordinary”
 - With existing customers payments that are ordinary may provide a defense to future clawback actions in the event of a customer bankruptcy

Managing Credit Risk Related to Your Customers

- Analyze Your Credit Risk – “3 Cs”
 - Character – Will they pay?
 - Capacity – Can they pay?
 - Collection – What if they don't pay?

Managing Credit Risk Related to Your Customers

- Use Your Credit Application Effectively
 - Choice of Law
 - Forum Selection
 - Personal Guaranty
 - Interest on Delinquent Accounts
 - Attorneys' Fees, Collection Costs
 - Security Interest

Managing Credit Risk Related to Your Customers

- Consider Using Secured Credit
 - Mortgage (real estate)
 - Security Interest (tangible and intangible personal property)
 - Security Agreement
 - Purchase Money Security Interest

Managing Credit Risk Related to Your Customers

- Other Credit Enhancements
 - Guaranties
 - Letter of Credit
 - Credit Insurance
 - Deposit

UCC Remedies When You Discover Your Customer is Insolvent

- Demand for Adequate Assurance § 2-609
- Withhold delivery - § 2-702(1)
- Stop delivery of goods in transit - § 2-705
- Reclaim the goods - § 2-702(2)

Managing Credit Risk Related to Your Suppliers

- Analyze Your Credit Risk—The “3 C’s” Still Apply
 - Character – Will they perform?
 - Capacity – Can they perform?
 - Collection/Cover – What if they don’t perform?

Managing Credit Risk Related to Your Suppliers

- Make Effective Use of Purchase Order and Contract Terms
 - Require Financial Reporting
 - Ownership of Tooling
 - Right to Terminate for Financial Insecurity: Cannot be tied to bankruptcy or insolvency – 11 USC §§ 365(c)(h) and 541(b)(6)
 - Back-loaded Installment Payments

Managing Credit Risk Related to Your Suppliers

- Consider Contract Terms that Contemplate Worst Case Scenarios
- Add Terms to Services Contract to Allow for Control or Transition to Another Supplier
 - Software Escrow
 - Access to Premises and People

Managing Credit Risk Related to Your Suppliers

- Other Credit Enhancements
 - Performance Guarantees
 - Guarantee of Liquidated Damages
 - Performance Bond

UCC Remedies Upon Discovery Supplier Is Insolvent

- Demand Adequate Assurance of Performance § 2-609
 - Suspend payment until goods received
 - Failure to provide adequate assurance within reasonable time not exceeding 30 days is repudiation
- UCC Remedies for Repudiation or Breach
 - Cancel the contract, “cover,” or seek damages for the breach
 - Recover goods that have been identified to the contract § 2-502
 - Specific performance in appropriate circumstances

Solvency Issues with Customers or Suppliers

- **Key Learnings:**

- ✓ It's important to do the work on the front end
- ✓ Know your vendors and suppliers and continue to do your homework
- ✓ Develop a relationship with your attorney so you are protected when something goes wrong

Small Business Bankruptcies: Important Considerations



SBRA: Small Business Reorganization Act of 2019

- Signed by the President on August 23, 2019
- Enacts a new Subchapter V of Chapter 11
- Codified as new 11 U.S.C. §§ 1181-1195
- Effective: February 19, 2020 – 180 days after its enactment
- Recently amended as part of Coronavirus Aid Relief and
- Economic Security Act (“CARES Act”)

SBRA: Small Business Reorganization Act of 2019

- Passed by Congress to increase efficiency, lower costs, and ease the plan confirmation process for small businesses
- To qualify as a small business debtor, the debtor must be a person or entity engaged in commercial or business activity with aggregate secured and unsecured debts of \$2,725,625
- The CARES Act would increase that debt limit to \$7,500,000 for a period of one year following the enactment of the Act.
- Single Asset Real Estate Debtors are not eligible to file under Subchapter V

SBRA: Small Business Reorganization Act of 2019

- Key Provisions
 1. Streamlining the reorganization process
 2. A trustee will be appointed in every case
 3. No impaired class of creditors is required to vote in favor of the plan
 4. The absolute priority rule is eliminated
 5. Eliminates the categorical prohibition against individual small business debtors modifying their residential mortgages
 6. Reduced cost and expenses
 7. Payment of costs and expenses may be delayed

SBRA: Small Business Reorganization Act of 2019

- Streamlining the Reorganization Process
 - Only the debtor may file a plan
 - Deadline for the plan is 90 days after the order for relief
 - Court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable
 - Debtor is not required to file a Disclosure Statement unless the court requires it
 - Reduces the amount of paperwork and filings required by a Debtor

SBRA: Small Business Reorganization Act of 2019

- Subchapter V provides for a trustee in all cases
 - Court has no role in the appointment of the trustee
 - UST Program has selected a pool of persons (lawyers and financial persons) who may be appointed on a case-by-case basis
 - A trustee appointed while leaving the debtor in possession of assets and control of the business
 - Trustee has oversight and monitoring duties, as well as charged with facilitating a consensual plan
 - Trustee is terminated upon substantial consummation of the plan

SBRA: Small Business Reorganization Act of 2019

- Additional Change from a typical Chapter 11
 - No impaired class of creditors is required to vote in favor of the plan
 - Elimination of the Absolute Priority Rule
 - Eliminates the categorical prohibition against individual small business debtors modifying their residential mortgages

SBRA: Small Business Reorganization Act of 2019

- Reduces expenses related to Chapter 11
 - Eliminates quarterly U.S. Trustee Fees
 - Eliminates an Unsecured Creditors Committee
 - Allows for payment of Trustee and Professionals over time through post-confirmation payments

Bankruptcy Issues Affecting Contracts



Bankruptcy Issues Affecting Contracts

- Immediate Concerns
 - Automatic Stay
 - Any act to collect a debt or to exercise control over property of the estate is stayed
 - Litigation: Trials and appeals
 - Creation, perfection of liens, security interests

Bankruptcy Issues Affecting Contracts

- Doing Business With the Debtor in Possession
 - Debtor-in-possession is authorized to continue to operate its business
 - No obligation to do business with a debtor-in-possession unless party to an executory contract
 - Free to negotiate new credit terms
 - Credit extended for post-petition transactions is entitled to administrative expense status
 - Cannot demand payment of pre-petition debt as a condition to further shipments – violation of the automatic stay
 - Ensure that debtor has ability and authority to pay

Bankruptcy Issues Affecting Contracts

- Executory Contracts
 - Definition: A contract under which there remains material obligations to perform on both sides
 - Must perform if debtor performs post-petition
 - Ipso Facto clauses are not enforceable
 - Debtor has the right to assume, assume and assign, or reject the contract

Bankruptcy Issues Affecting Contracts

- Examples of executory contracts (and some common reasons why they might be executory) include:
 - Real estate leases
 - Equipment leases
 - Service Agreements
 - Development contracts, and
 - Licenses to intellectual property

Bankruptcy Issues Affecting Contracts

- Treatment of Executory Contracts is a powerful sword for Debtors
 - Assume
 - Assume and Assign
 - Reject
- In each case, the matter is within the reasonable business judgment of the Debtor, requiring the Debtor only to demonstrate that its decision was in the best interest of the company.

Bankruptcy Issues Affecting Contracts

- Assumption of Contracts
 - Accomplished by motion of the debtor-in-possession or trustee, subject to objection by other creditors and court approval
 - Debtor must “cure” prepetition defaults, compensate the non-debtor for actual monetary losses caused by defaults, and assure future performance
 - Debtor typically has until confirmation to determine whether to assume or reject contract. Non-residential real property leases in Chapter 11, Debtor must assume or reject within 120 days, which can be extended by 90 days. Further extensions require consent of lessor

Bankruptcy Issues Affecting Contracts

- Effect of Assumption
 - The contract remains in effect and both parties are able to enforce all terms of the contract going forward
 - Debtor must assume contract in its entirety
 - Debtors will often seek to negotiate reduced cure amounts or amendments to contracts in exchange for assuming the contract

Bankruptcy Issues Affecting Contracts

- Assumption and Assignment
 - Many bankruptcies include a sale of Debtor's assets, which can include contract rights
 - Purchaser of assets may desire to keep certain contract
 - Contractual anti-assignment provisions are invalidated
 - Debtor is still required to "cure" the contract
 - The Purchaser must provide adequate assurance of future performance under the contract
 - The Debtor is no longer responsible for liabilities and obligations arising under a lease or contract once it is assigned. Must look to assignee for performance.

Bankruptcy Issues Affecting Contracts

- Rejection
 - Rejection by the Debtor does not terminate the contract but is a breach that can excuse performance of the Debtor and be a basis for non-debtor to terminate
 - Rejection gives rise to a claim for damages that is generally an unsecured claim
 - Debtor is still required to pay for goods and services received after the petition date and prior to rejecting the contract

Bankruptcy Issues Affecting Contracts

- Non-Debtor Rights After Rejection
 - Real Property Leases
 - Non-debtor tenants (lessees) under real property leases have the right to remain in possession of the property and other ancillary rights, even though the debtor landlord has rejected the lease. Tenant must continue to pay rent but may reduce rent by the amount of services the Debtor has failed to provide
 - Non-debtor landlords (lessors) under leases of non-residential real property are entitled to immediate surrender of the premises

Bankruptcy Issues Affecting Contracts

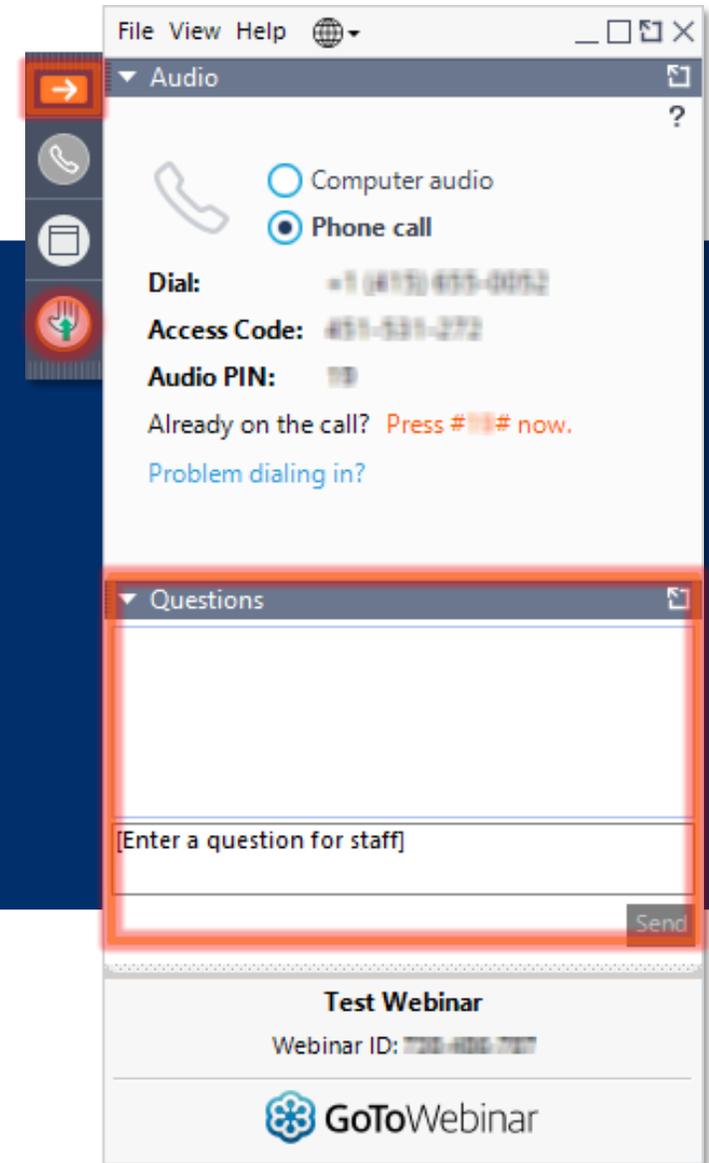
- Licensees of intellectual property
 - Licensees of rights to intellectual property granted under contracts that have been rejected have the option to retain these rights (including any right to exclusive use, but excluding any other right to specific performance of the contract) for the duration of the contract and to exercise any rights to extend the contract

Bankruptcy Issues Affecting Contracts

- **Key Learnings:**

- ✓ The Debtor has the most leverage in determining which contracts that it wants to keep
- ✓ Be sure to respond to any deadlines set by the bankruptcy court, which can come up quickly in a bankruptcy
- ✓ Ask for help to best protect your rights

Please type your message/question in the window pane of the attendee control panel.



Questions?

Successfully Navigating Customer and Supplier Bankruptcies During COVID-19

• **Key Learnings:**

- ✓ It is important to strategize on the front end to provide yourself the best protections in a downturn
- ✓ We expect there will be an increase in small businesses filing bankruptcy
- ✓ Your contract rights may be affected when a customer or supplier files bankruptcy



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